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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1985

SHARON STEEL CORPORATION,
Appellant,

v.

THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C.A. § 6901 *et seq.*, preempt a municipal ordinance which prohibits all disposal of hazardous waste pursuant to a federal hazardous waste permit, declares establishment of a federally permitted site to be a nuisance, and makes such disposal a criminal offense?

2. Does Section 6929 or Section 6972(f) of RCRA allow a political subdivision of a state to legislatively prohibit all disposal of hazardous waste within its borders?

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The opinion of the Supreme Court of Appeals of West Virginia, from which this appeal is taken, is reported at 22 ENV'T REP. (BNA) 1983 (1985) and is set out in Appendix A hereto. The opinion and order of the Circuit Court of Marion County, West Virginia are not reported but are set out in Appendices C and D hereto.

STATEMENT OF JURISDICTION

On July 5, 1983, appellant Sharon Steel Corporation (Sharon) filed a declaratory judgment action against the City of Fairmont, West Virginia (Fairmont or the City) seeking a declaration that Fairmont Ordinance No. 597 (the Ordinance) is preempted by the federal Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C.A. § 6901 *et seq.* (West Supp. 1985). By opinion dated February 22, 1984 and order dated April 13, 1984, the Circuit Court of Marion County, West Virginia rejected Sharon's challenge and ruled that the Ordinance is valid. The Circuit Court held that "[b]oth case law and the specific language of [RCRA] indicate that the [Ordinance] and other similar state and local laws are not meant to be preempted . . .." (App. C, 26a-27a; App. D, 30a.) By opinion dated June 3, 1985, the Supreme Court of Appeals of West Virginia affirmed, holding that RCRA "do[es] not conflict with and therefore do[es] not preempt" the Ordinance. (App. A, 12a.) Appellant's timely petition for rehearing, dated June 27, 1985, was denied on July 10, 1985. (App. B, 24a-25a.) Notice of appeal to this Court was timely filed with the Supreme Court of Appeals of West Virginia and with the Circuit Court of Marion County, West Virginia on October 2, 1985. (App. E, 32a-35a.)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). Local ordinances are treated in the same manner as state statutes for jurisdictional purposes. *See, e.g., Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2374 n.1 (1985); *City of New Orleans v. Dukes*, 427 U.S. 297, 301 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 n.2 (1975); *City of Chicago v. Atchison, T.&S.F.R.Co.*, 357 U.S. 77, 82 (1958).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article 6, clause 2 of the United States Constitution, states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C.A. § 6929 provides:

> Upon the effective date of regulations under this [Hazardous Waste Management] subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this chapter shall be

construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.

42 U.S.C.A. § 6972(f) provides:

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator [of the Environmental Protection Agency] or a State agency).

42 U.S.C.A. § 6903 provides in part:

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

* * *

(5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Fairmont Ordinance No. 597 is set out in full in Appendix G hereto. Sections 2, 3 and 4 of said Ordinance provide:

> Section 2. *Prohibition:* It shall be unlawful for any person to permanently dispose or attempt to permanently dispose of hazardous waste within the City. Provided, however, that storage of hazardous wastes by duly licensed and taxpaying enterprises shall not be prohibited.
>
> Section 3. *Nuisance:* In the event any person shall dispose or establish a site for the permanent disposal of hazardous waste in violation of the provisions of this Ordinance, the City Attorney is authorized, upon instructions from the City Manager, in addition to other penalties set forth herein, to institute any appropriate civil action or proceedings to prevent such disposal of hazardous waste, the same being deemed a public nuisance.
>
> Section 4. *Penalties:* Any person who shall violate a provision of this Ordinance or fail to comply with any of the requirements hereof shall be guilty of a misdemeanor, punishable by a fine of not more than Five Hundred Dollars, or by imprisonment not exceeding thirty days, or both fine and imprisonment. Each day that a violation continues or has not been totally abated shall be deemed a separate offense.

Section 1 of the Ordinance provides in part:

> Section 1. *Definitions:* 'Permanent Disposal' or 'Permanently Dispose' means the discharge, deposit, injection, dumping, spilling, leaking or placement of any hazardous waste into, on, above, or below any land or water which waste is to remain or which has remained at a disposal site within the City for a continuous period of five years and which is not intended to be removed from such site.

'Hazardous Waste' means a waste or combination of wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics, may cause, or significantly contribute to an increase in mortality, or an increase in serious irreversible, or incapacitating reversible illness, or pose a substantial present or potential hazard to human health or the environment when stored. Provided, however, that hazardous wastes shall include only those whose disposal would require a state or federal hazardous waste permit.

STATEMENT OF THE CASE

From 1948 until 1979, Sharon operated a coke plant in Fairmont. During its operation, the plant generated and retained on-site waste which was later designated "hazardous waste" by regulations promulgated by the federal Environmental Protection Agency (EPA) pursuant to RCRA. In 1979, Sharon ceased operations at its Fairmont plant and, in accordance with the RCRA regulations, applied for permits to dispose of the previously retained wastes in a permanent hazardous waste containment facility to be constructed on-site. In 1983, while proceedings on Sharon's permit applications were continuing, the City enacted the Ordinance here challenged, making any permanent disposal of hazardous waste within the City unlawful and declaring the establishment of any site for such disposal to be a nuisance. The Ordinance was intended to prohibit Sharon's construction of its proposed facility when its federal hazardous waste disposal permit is issued.[1] Accordingly, Sharon brought its declaratory judgment action.

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1. In its complaint in the trial court, Sharon alleged as follows:

> 20. Sharon is informed and believes, and based upon such information and belief alleges, that the City intends that its planned construction of a permanent waste disposal facility on [its former plant site] is prohibited by the Ordinance.
>
> * * *
>
> 22. Sharon is informed and believes, and based upon such information and belief alleges, that the City intends to prosecute it for constructing or attempting to construct a permanent waste disposal facility on [its former plant site].

In its answer to Sharon's complaint, the City pleaded that:

> 1. The allegations of paragraphs . . . 20 [and] 22 [of Sharon's complaint] are admitted.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. The First Question Presented Is Important And Substantial Because The Ordinance, If Allowed To Stand, Will Thwart Congress' Comprehensive National Plan For Managing Hazardous Waste; Will Directly Conflict With The National Permit Program Under RCRA; And Will Promote The Proliferation Of Local Vetoes Of Federal Hazardous Waste Facility Permitting Decisions.

Can the political subdivisions of the states, consistent with RCRA, absolutely prohibit the construction and operation of federally-permitted hazardous waste disposal facilities within their borders? It is Sharon's contention that they cannot—that such prohibitions "stand . . . as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" embodied in RCRA and are therefore preempted. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 160-68 (1978).[2]

A. CONGRESS' PURPOSE IN ENACTING RCRA WAS TO PROMOTE COMPREHENSIVE, NATIONALLY UNIFORM, REGULATION OF HAZARDOUS WASTE AS PART OF A COORDINATED RESPONSE TO THE PROBLEMS OF ENVIRONMENTAL POLLUTION.

In enacting RCRA, Congress found that the problems of hazardous waste disposal "have become a matter national in scope and in concern . . . necessitat[ing] Federal action." 42 U.S.C.A. § 6901(a)(4). In order "to provide nationwide protection against the dangers of improper hazardous waste disposal," H.R. REP. No. 1491,

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2. For purposes of preemption analysis, the constitutionality of a local ordinance is analyzed in the same way as a state law. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2375 (1985).

94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6238, 6249, Congress established in RCRA a national framework for the comprehensive regulation of every aspect of hazardous waste from "cradle to grave". *See* 1976 U.S. CODE CONG. & AD. NEWS at 6242, 6254, 6261.

In pursuit of its goals, Congress directed that the administrator of the EPA (the Administrator), after consultation with appropriate federal and state agencies, develop and promulgate criteria identifying the characteristics of hazardous wastes and listing specific hazardous wastes, 42 U.S.C.A. § 6921(a), and then promulgate minimum standards applicable to persons generating, 42 U.S.C.A. § 6922, transporting, 42 U.S.C.A. § 6923, or owning or operating facilities for the treatment, storage or disposal, 42 U.S.C.A. § 6924, of such wastes.

The Administrator has promulgated extensive regulations to implement the RCRA program. *See* 40 C.F.R. Parts 260-271 (1984).

Congress provided that the states, at their option, could develop, implement and enforce their own hazardous waste programs in lieu of the federal program, provided such state programs contained regulations at least as stringent as those imposed by the federal program. 42 U.S.C.A. §§ 6926(b), 6929. The guiding principle was that such programs must be "equivalent to" and "consistent with" the federal program and state programs applicable in other states and provide for "adequate enforcement of compliance with the requirements" of RCRA respecting hazardous waste disposal. 42 U.S.C.A. § 6926(b).

The legislative history recites the following with respect to this structure of RCRA:

> The general purpose of having federal minimum standards for hazardous waste disposal, with the op-

> tion of state implementation of state programs equivalent to the federal program, is (1) it provides uniformity among the states as to how hazardous wastes are regulated, (2) it provides industry and commercial establishments that generate such wastes uniformity among states, (3) by providing such uniformity a state with environmentally sound laws does not drive business out of the state to a state which, for economic reasons, decides to be a dumping ground for hazardous wastes, and (4) by permitting states to develop and implement hazardous waste programs equivalent to the federal program, the police power of the states are utilized rather than the creation of another federal bureaucracy to implement this act.

1976 U.S. CODE CONG. & AD. NEWS at 6268.

Congress provided that RCRA would be enforced in a variety of ways: through inspections by authorized inspectors, 42 U.S.C.A. § 6927(a), through compliance orders issued by the Administrator and enforced in court, 42 U.S.C.A. § 6928(a)(1), and/or through imposition of civil, 42 U.S.C.A. § 6928(a)(3), or criminal, 42 U.S.C.A. § 6928(d), penalties. In addition, Congress provided that RCRA standards and requirements could be enforced in citizens' suits. 42 U.S.C.A. § 6972(a).

Above all, Congress intended that RCRA be an integral part of a coordinated national response to the national problem of environmental pollution. *See, e.g.*, the Clean Air Act, as amended, 42 U.S.C.A. § 7401 *et seq.* (West Supp. 1985); the Clean Water Act, as amended, 33 U.S.C.A. § 1251 *et seq.* (West Supp. 1985); and the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C.A. § 9601 *et seq.* (West Supp. 1985). As the report of the House of Representatives Committee which favorably recommended RCRA for passage states:

> The Committee believes that the approach taken by this legislation eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes. Further, the Committee believes that this legislation is necessary if other environmental laws are to be both cost and environmentally effective. At present the federal government is spending billions of dollars to remove polluta[nt]s from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner. The existing methods of land disposal often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way.

1976 U.S. CODE CONG. & AD. NEWS at 6241-6242.

B. THE ORDINANCE IS IN DIRECT CONFLICT WITH RCRA BECAUSE IT PROHIBITS AND DECLARES TO BE A NUISANCE THAT, AND PRECISELY AND ONLY THAT, WHICH RCRA PERMITS.

Congress provided in RCRA that each person who would own or operate a facility for the treatment, storage or disposal of hazardous wastes must first obtain a permit from the Administrator to conduct such activities. The disposal of any hazardous waste, except in accordance with the provisions of such a federal hazardous waste disposal permit, is prohibited. 42 U.S.C.A. § 6925(a).[3]

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3. A permit issued by a state agency pursuant to a fully approved state hazardous waste program has the same effect as a federal permit issued pursuant to 42 U.S.C.A. § 6925(a). 42 U.S.C.A. § 6926(d). West Virginia does not yet have a fully approved state hazardous waste program.

The Ordinance prohibits the permanent disposal of, and declares to be a nuisance the establishment of any site for the permanent disposal of, hazardous waste within the City's boundaries. Ordinance §§ 2, 3. The Ordinance defines the terms "permanent disposal" and "hazardous waste" in virtually the same words as RCRA. *Cf.* Ordinance § 1 and 42 U.S.C.A. §§ 6903(3), 6903(5). Significantly, the Ordinance adds a proviso to the definition of "hazardous waste" which provides that the term as used in the Ordinance "shall include only those [wastes the permanent disposal of which] would require a state or federal hazardous waste permit."

Thus, the Ordinance prohibits and declares to be a nuisance that—and precisely and only that—which the federal government permits under RCRA. It is difficult to imagine a more direct conflict between a local enactment and federal law.

C. THE ORDINANCE IS DIRECTLY CONTRARY TO THE NATIONAL POLICY ON THE ROLE OF LOCAL POLITICAL SUBDIVISIONS WITHIN THE RCRA REGULATORY PROGRAM.

In order to obtain a hazardous waste disposal permit, Congress provided that an applicant must make a detailed showing that his proposed facility will comply in all respects with the Administrator's standards promulgated under RCRA. 42 U.S.C.A. § 6925(c). If a proposed facility does so comply, the Administrator is obligated to issue the required permit. 42 U.S.C.A. § 6925(c).

Congress recognized, however, that, since a hazardous waste disposal permit is site-specific, local governmental units would have legitimate interests in any decision the Administrator would make. It required, therefore, that, prior to the time the Administrator may issue any permit, he must provide notice to "each unit of local government having jurisdiction over the area in which such facility is proposed to be located and to each

State agency having any authority under State law with respect to the construction or operation of such facility" of his intent to issue such permit. 42 U.S.C.A. § 6974(b). If he receives notice of opposition to his intent, he is required to hold a public hearing at which oral and written testimony must be received. *Id.* Only after the hearing contemplated by this Section can the Administrator issue any permit. *Id.* There is no question, however, that Congress intended the ultimate permitting decision to be the Administrator's.

Fairmont's Ordinance is directly contrary to the congressional policy embodied in these provisions of RCRA. Where Congress provided that local governments would be participants in a decision-making process, Fairmont would short-circuit the process through the imposition of a blanket local siting ban. Where Congress provided that the Administrator would be the ultimate decision-maker, Fairmont would unilaterally veto any decision he might make. Fairmont would turn Congress' plan upside down. The tail would wag the dog. It is difficult to imagine an enactment more contrary to a congressional scheme.

D. LOCAL PROHIBITIONS, SUCH AS THIS ORDINANCE, POSE A REAL AND SUBSTANTIAL THREAT TO CONGRESS' GOALS IN RCRA AND OTHER FEDERAL POLLUTION CONTROL LEGISLATION.

The issue presented in this case is not new. In 1979, EPA considered local disposal bans in the context of attempts by local governments to prohibit the disposal within their borders of polychlorinated biphenyls (PCBs), a hazardous substance disposal of which is regulated under the federal Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.* (TSCA). In words equally applicable to RCRA, EPA responded to these attempts as follows:

> . . . EPA has become concerned that actions by local and State governments to prohibit disposal of PCBs and other substances in their jurisdictions could

> frustrate the national goal of properly disposing of hazardous chemical substances. While EPA has always believed that States should have the right to set pollution control standards more restrictive than the Federal standards, it would be a matter of national concern if this principle were to become the basis for refusal by States to share in the national responsibility for finding safe means for the proper disposal of hazardous substances.

44 Fed. Reg. 31528 (1979).

State and federal courts have also considered the issue presented in this case. Until now, each has recognized the real and substantial threat presented by local enactments such as Fairmont's to federal pollution control efforts.

In *Rollins Environmental Services, Inc. v. Iberville Parish Police Jury*, 371 So.2d 1127, 1132 (La. 1979), a RCRA case, the Supreme Court of Louisiana struck down an ordinance prohibiting the disposal of hazardous waste within the boundaries of a political subdivision of that state on the grounds that it was "not difficult to conclude that if [the subdivision] is permitted to prohibit the disposal of industrial hazardous waste within its borders, there will be, in short order, similar ordinances in every [subdivision] of the State."

Similarly, in *Warren County v. North Carolina*, 528 F. Supp. 276, 289-90 (E.D. N.C. 1981), a TSCA case, a federal district court struck down a local ordinance prohibiting the disposal of PCBs within the local government's boundaries, reasoning:

> Were the Court to approve this ordinance, no doubt the other ninety-nine counties in North Carolina would quickly enact identical bans. What, then, would North Carolina do with the PCB laced soil? Surely our neighbors in Virginia and Tennessee,

> South Carolina and Georgia would also object to our carrying such wastes into their states. The [challenged] ordinance clearly stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Toxic Substances Control Act and, therefore, is void.

The decision of the Supreme Court of Appeals of West Virginia in the instant case thus stands in stark contrast to previous decisional law in the area of hazardous waste disposal. Moreover, the decision, if allowed to stand, legitimizes local resistance to Congress' carefully-crafted anti-pollution control efforts. If Fairmont's Ordinance is valid, other political subdivisions in West Virginia, and in other states, will inevitably follow suit with devastating effects on Congress' attempts to address the serious problems of environmental pollution in a coordinated, uniform manner.

The dangers inherent in this decision extend beyond RCRA. For example, in December 1980 Congress passed the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C.A. § 9601 *et seq.* (West Supp. 1985), to address the problems caused by releases into the environment of hazardous substances from waste sites that were closed or abandoned prior to the effective date of the RCRA regulations. CERCLA gives the Administrator a variety of tools to prevent and remedy such releases: he may clean up a site and recover the cost of so doing from the persons responsible, 42 U.S.C.A. § 9607(c)(3); he may use the Hazardous Substance Response Fund (Superfund) to finance the cleanup, 42 U.S.C.A. §§ 9604(c), 9611; or he may compel those responsible for the release to clean up the site, 42 U.S.C.A. §§ 9604, 9606(a). Where are these hazardous substances to be taken once they are captured? Some may be detoxified, but, until now, most have been taken to sites with federal hazardous

waste disposal permits or having the status of sites with such permits. Thus, the CERCLA program, too, is threatened by the decision of the Court below in the instant case: Congress' efforts embodied in CERCLA directed at remedying past environmental pollution can be brought to a halt if localities in which hazardous waste disposal sites are located can follow Fairmont's lead of prohibiting such disposal and making such disposal a crime.[4]

It is difficult to imagine a more obvious obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

II. The Second Question Presented Is Important And Substantial Because The Provisions Of RCRA Preserving Certain Rights For Citizens And States Cannot Be Interpreted To Allow Exceptions To Swallow The Rule By Sanctioning Local Prohibitions Of Federally Permitted Hazardous Waste Facilities.

A. SECTION 6972(f) OF RCRA PERTAINS TO CITIZENS' SUITS AND HAS NO RELEVANCE TO A DETERMINATION OF THE LEGALITY OF THE ORDINANCE.

The Court below held that, since RCRA contains a provision, 42 U.S.C.A. § 6972 (f), "preserving common law actions, including nuisance actions, an ordinance

4. The decision in the instant case might also have implications in the area of nuclear waste disposal. *See, e.g., Jersey Central Power & Light Co. v. Township of Lacey,* Nos. 84-5652 and 84-5763 (3d Cir. September 6, 1985), where a local ordinance prohibited the importation and storage of nuclear wastes. The Third Circuit held such an ordinance to be preempted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011-2296 (1982), and the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812 (1982) (HMTA). With respect to the latter, the court held that the ordinance was not "consistent" with federal pollution control efforts as embodied in the HMTA.

passed by a municipality declaring the permanent disposal of hazardous wastes as therein defined to be a public nuisance is not pre-empted . . . ." (App. A, 1a, syllabus point 1.)[5]

Section 6972 of RCRA is captioned "Citizens suits". Subsection (a) of the Section provides that, subject to certain requirements set forth therein, any person may commence a civil action on his own behalf—

> (1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or
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5. As described elsewhere herein (*see, e.g.*, pp. 6, 10), the Ordinance here challenged declares the establishment of any site for the permanent disposal of hazardous waste to be a nuisance. Ordinance § 3. Independent of this Section, the Ordinance also prohibits all disposal of hazardous waste within the City without reference to principles of nuisance law. Ordinance § 2. The Ordinance also provides for criminal penalties for violations of either Section 2 or 3. Ordinance § 4. The Court below never addressed these latter two Sections of the Ordinance. More basically, although four of six syllabus points in the lower Court's opinion mention the word "nuisance", the issue before this Court in fact has nothing to do with nuisance. The issue presented here is the legal power of a municipality to pass an ordinance prohibiting that and only that which federal law specifically authorizes pursuant to permits. It is of no moment whatsoever whether that ordinance is styled a prohibition, a regulation or a nuisance abatement. Our federal system would be fragile indeed if national policies could be thwarted merely by denominating offending local enactments as "nuisance abatement" enactments. Assuming *arguendo* that Fairmont's Ordinance is merely a nuisance ordinance, it still should be subjected to the same preemption analysis as applied to any other local enactment.

> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

42 U.S.C.A. § 6972 (a). Thus, Congress intended that Section 6972 provide another enforcement weapon (*i.e.*, citizens' suits) to aid in achieving compliance with the requirements of RCRA. Congress then added subsection (f) to make it clear that any person could also seek enforcement of solid or hazardous waste requirements under other statutes or common law:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency.)

42 U.S.C.A. § 6972(f).

Plainly, Fairmont's Ordinance is not a "citizens suit". Moreover, Section 6972(f) simply has no relevance to this case since the Ordinance is not directed at enforcing "any standard or requirement relating to the management of solid waste or hazardous waste".

In brief, rather than giving Section 6972 the role in the RCRA scheme Congress intended for it (*i.e.*, as an additional enforcement provision), the Court below held that it was intended to permit local governmental bodies to avoid involvement in RCRA. Its misreading of Section 6972 then caused the Court below to examine inapposite case law to determine the preemption issue. It cited cases for the proposition that nuisance actions may be brought despite the enactment of RCRA (App. A, 11a-15a), a proposition that at no time has been contested

by Sharon. The Court below apparently read Section 6972(f) to exempt "from the ambit of the federal act" any municipal enactment that could be construed to have nuisance abatement as its subject matter. (App. A, 15a). As set forth above, however, the context makes clear that the correct reading of that Section restricts its application to those municipal enactments that would further, and not frustrate, the standards and requirements of RCRA.

B. Section 6929 of RCRA cannot be read to authorize local governments to prohibit absolutely construction of hazardous waste facilities within their boundaries.

Significantly, in presenting its case below, the City of Fairmont never even cited Section 6972(f) relied on by the Court below to uphold the Ordinance. The City relied on Section 6929 of the Act—which the Court below never referred to in its opinion.

RCRA Section 6929 provides in pertinent part as follows:

> Upon the effective date of regulations under this [Hazardous Waste Management] subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations. . . . Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.

The Ordinance here challenged has nothing at all to do with "imposing requirements" respecting hazardous waste disposal. It is, instead, a blanket ban on all such disposal within a particular geographic area. Moreover,

as set forth above, Congress' scheme in RCRA was to provide for the promulgation by the federal government of minimum standards applicable to hazardous waste management practices, with an option in the states and their subdivisions to impose more stringent requirements which were "equivalent to" and "consistent with" the scheme of RCRA. A blanket local facilities siting ban is neither.

Congress could not possibly have intended to permit a local governmental body to exempt itself completely from RCRA through the insertion of this single Section. Yet a decision upholding the Fairmont Ordinance—on whatever ground—has precisely this effect.

CONCLUSION

For the reasons stated above, the questions presented in this matter are so substantial as to require plenary consideration by this Court, with briefs on the merits and oral argument, for their resolution. It is absolutely imperative that this Court assert its jurisdiction in this case and unequivocally assert that no local governmental unit can do what Fairmont has done, *i.e.*, absolutely prohibit the disposal of hazardous wastes pursuant to a federal hazardous waste disposal permit. Failure to do so is to invite disaster on federal pollution control efforts such as those embodied in RCRA.

Respectfully submitted,

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APPENDIX A

OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 16349

SHARON STEEL CORPORATION

v.

CITY OF FAIRMONT, ET AL.

Marion County — Affirmed

MILLER, *Justice*

1. Since both the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(f), and the West Virginia Hazardous Waste Management Act, W. Va. Code, 20-5E-18(d) and -18(h), have provisions preserving common law actions, including nuisance actions, an ordinance passed by a municipality declaring the permanent disposal of hazardous wastes as therein defined to be a public nuisance is not pre-empted by the federal or State acts.

2. "'A municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.' Syllabus Point 2, *State ex rel. Charleston v. Hutchinson*, 154 W. Va. 585, 176 S.E.2d 691 (1970)." Syllabus Point 1, *City of Fairmont v. Investors Syndicate of America, Inc.*, ___ W. Va. ___, 307 S.E.2d 467 (1983).

3. A municipality has the authority to declare the improper permanent disposal of hazardous wastes a public nuisance under W. Va. Code, 8-12-5(23), which empowers municipalities "[t]o provide for the elimination of hazards to public health and safety," where the term

"hazardous waste" in the ordinance is defined, in part, as material which poses a substantial present or potential hazard to human health or the environment.

4. "Under the provision of the charter of the city of Fairmont, same as Code 1906, ch. 47, sec. 28 [now W. Va. Code, 8-12-5(23)], that 'the council shall have power to abate or cause to be abated anything which, in the opinion of a majority of the whole council, shall be a nuisance,' the council may abate only that as a nuisance which is recognized as such *per se*, or branded as such by lawful statute or ordinance." Syllabus Point 1, *Parker v. City of Fairmont*, 72 W. Va. 688, 79 S.E. 660 (1913).

5. "As a general rule, a fair test as to whether a particular use of real property constitutes a nuisance is the reasonableness or unreasonableness of the use of the property in relation to the particular locality involved, and ordinarily such a test to determine the existence of a nuisance raises a question of fact." Syllabus Point 3, *Sticklen v. Kittle*, __ W. Va. __, 287 S.E.2d 148 (1981).

6. "The legislature is vested with a wide discretion in determining what the public interest requires, the wisdom of which may not be inquired into by the courts; however, to satisfy the requirements of due process of law, legislative acts must bear a reasonable relationship to a proper legislative purpose and be neither arbitrary nor discriminatory." Syllabus Point 1, *State v. Wender*, 149 W. Va. 413, 141 S.E.2d 359 (1965), *overruled on other grounds, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, __ W. Va. __, 328 S.E.2d 144 (1984).

MILLER, *Justice:*

Sharon Steel Corporation brought a declaratory action against the City of Fairmont challenging the legality of its Ordinance No. 597, which prohibits the permanent

disposal of hazardous wastes in the City as a public nuisance. The Circuit Court of Marion County upheld the ordinance. Sharon Steel argues that the ordinance should be invalidated for several reasons. First, because of the extensive federal and State regulation of hazardous wastes under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (RCRA)[1] and the West Virginia Hazardous Waste Management Act, W. Va. Code, 20-5E-1 through -23 (WVHWMA), the City is pre-empted from enacting local legislation on the subject. Second, the City lacks the authority to pass such an ordinance. Finally, the ordinance is in violation of substantive due process principles. We affirm the circuit court for the reasons hereinafter set out.

Sharon Steel operated a coking plant in the City of Fairmont from 1948 until 1979. During that time, the plant generated hazardous wastes as a by-product of its operations. After closing the coking plant, Sharon Steel sought to construct a permanent hazardous waste containment facility at the same location to dispose of the hazardous waste by-products that had accumulated. Sharon Steel has applied for the necessary federal and State permits for the construction of such a facility, but as of the time of this appeal, these permits have not yet been acquired or approved.

In June of 1983, Fairmont passed its Ordinance No. 597, which is the focal point of the controversy in this case.[2] The key portion of the ordinance is Section 2,

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1. The Solid Waste Disposal Act was amended in 1976 by the RCRA, which, among other changes, provided for hazardous waste management.

2. The full text of Ordinance No. 597 is:

"WHEREAS, West Virginia Code § 8-12-5 given plenary power and authority for municipalities to control and administer waterfronts and waterways;

which states the type of activity that Fairmont seeks to prohibit: "It shall be unlawful for any person to permanently dispose or attempt to permanently dispose of hazardous waste within the City. Provided, however, that storage of hazardous wastes by duly licensed and tax-paying enterprises shall not be prohibited." The term "storage" is defined in Section 1 to mean "local containment of hazardous wastes which wastes are not intended

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to prohibit the accumulation and require the disposal of garbage, refuse, waste, ashes, trash and other similar matters; to prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome; to project and promote the public morals, safety, health, welfare and good order; to provide for the elimination of hazards to public health and safety and to abate or cause to be abated anything which in the opinion of a majority of the governing body is a public nuisance; and

"WHEREAS, The City Council finds that permanent disposal of hazardous wastes within the City is a nuisance in that it may depreciate property values; have an adverse impact on the City's ability to attract new business and industry and encourage expansion of existing business and industry; create a continuing serious anxiety and concern among city residents and visitors concerning the existence of a permanent hazardous waste disposal site within the city, all of which are offensive and constitute injury and annoyance to the public and individuals; and

"WHEREAS, the City Council finds that prohibition of the permanent disposal of hazardous waste will protect and promote the public morals, safety, health, welfare and good order in the City;

"NOW THEREFORE THE CITY OF FAIRMONT HEREBY ORDAINS THAT:

"SECTION 1. *Definitions:* 'Permanent Disposal' or 'Permanently Dispose' means the discharge, deposit, injection, dumping, spilling, leaking or placement of any hazardous waste into, on, above, or below any

to be permanently disposed of at any site within the City." Thus, Section 2 indicates that the ordinance allows the temporary storage of hazardous wastes by "duly licensed and taxpaying enterprises." It is only the permanent disposal of hazardous wastes that the ordinance seeks to prohibit.

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land or water which waste is to remain or which has remained at a disposal site within the City for a continuous period of five years and which is not intended to be removed from such site.

"'Hazardous Waste' means a waste or combination of wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics, may cause, or significantly contribute to an increase in mortality, or an increase in serious irreversible, or incapacitating reversible illness, or pose a substantial present or potential hazard to human health or the environment when stored. Provided, however, that hazardous wastes shall include only those whose disposal would require a state or federal hazardous waste permit.

"'Person' means any individual, trust, firm, joint stock company, public or private or governmental corporation, partnership, association, state or federal agency.

"'Storage' means the otherwise local containment of hazardous wastes which wastes are not intended to be permanently disposed of at any site within the City.

"'Waste' means any garbage, refuse, sludge, and other discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial mining and agricultural operations, but does not include solid or dissolved material in domestic sewage.

"SECTION 2. *Prohibition:* It shall be unlawful for any person to permanently dispose or attempt to permanently dispose of hazardous waste within the City. Provided, however, that storage of hazardous wastes by duly licensed and taxpaying enterprises shall not be prohibited.

The term "waste" is defined in Section 1 to be "garbage, refuse, sludge, and other discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial mining and agricultural operations." The term "hazardous waste" parallels the definition of hazardous waste found in both the federal and State acts.[3] The only difference is that the ordinance definition does not adopt the ending phrase "when improperly treated, stored, transported" used in the federal and State acts, but simply concludes with the words "when stored."

The thrust of the ordinance is directed at prohibiting the permanent storage of hazardous wastes which are improperly stored in the sense that the wastes may "cause, or significantly contribute to an increase in mor-

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"SECTION 3. *Nuisance:* In the event any person shall dispose or establish a site for the permanent disposal of hazardous waste in violation of the provisions of this Ordinance, the City Attorney is authorized, upon instructions from the City Manager, in addition to other penalties set forth herein, to institute any appropriate civil action or proceedings to prevent such disposal of hazardous waste, the same being deemed a public nuisance.

"SECTION 4. *Penalties:* Any person who shall violate a provision of this Ordinance or fail to comply with any of the requirements hereof shall be guilty of a misdemeanor, punishable by a fine of not more than Five Hundred Dollars, or by imprisonment not exceeding thirty days, or both fine and imprisonment. Each day that a violation continues or has not been totally abated shall be deemed a separate offense.

"This Ordinance shall become effective not sooner than thirty (30) days after adoption."

3. The definition of "hazardous waste" found in W. Va. Code, 20-5E-3(6), is identical to that found in the RCRA, 42 U.S.C. 6903(5), and is as follows:

tality, or [serious] illness . . . or pose a substantial present or potential hazard to human health or the environment when stored." Ordinance No. 597, Sections 1 and 2.

The RCRA and the WVHWMA are primarily regulatory in nature and are designed to prevent improper treatment, storage, transportation, and disposal of hazardous wastes. They proceed on the theory that the technology exists to properly treat hazardous wastes so that they will not cause substantial harm to human health or the environment.

The City's ordinance is not regulatory. It is a penal ordinance directed at persons who improperly permanently store hazardous wastes which endanger human health or the environment. This conclusion is evident from the definitions in Section 1, the prohibition in Section 2, the nuisance provision in Section 3, and the penalty provision in Section 4. The net effect of the ordinance is to define a public nuisance condition involving hazardous wastes.

Through the enactment of this ordinance, the City is attempting to abate what it considers to be a public nuisance. *In Hark v. Mountain Fork Lumber Co.*, 127 W. Va. 586, 595-96, 34 S.E.2d 348, 354 (1945), we gave the following general definition of public nuisance:

"'Hazardous waste' means a waste or combination of wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics, may (A) cause, or significantly contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed."

> "A public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons. The distinction between a public nuisance and a private nuisance is that the former affects the general public, and the latter injures one person or a limited number of persons only. Ordinarily, a suit to abate a public nuisance cannot be maintained by an individual in his private capacity, as it is the duty of the proper public officials to vindicate the rights of the public."

See also W. Prosser and W. Keeton, The Law of Torts § 90 (5th ed. 1984); W. Rodgers, Jr., Handbook on Environmental Law § 2.2 (1977); Restatement (Second) of Torts § 821B (1979); 58 Am. Jur. 2d *Nuisances* § 7 (1971).

In *Martin v. Williams*, 141 W. Va. 595, 610-11, 93 S.E.2d 835, 844, 56 A.L.R.2d 756, 768 (1956), we generally described what may constitute a nuisance:

> "A nuisance is anything which annoys or disturbs the free use of one's property, or which renders its ordinary use or physical occupation uncomfortable .... A nuisance is anything which interferes with the rights of a citizen, either in person, property, the enjoyment of his property, or his comfort .... A condition is a nuisance when it clearly appears that enjoyment of property is materially lessened, and physical comfort of persons in their homes is materially interfered with thereby .... When the prosecution of a business, of itself lawful, in a strictly residential district, impairs the enjoyment of homes in the neighborhood, and infringes upon the well-being, comfort, repose, and enjoyment of the ordinary normal individual residing therein, the carrying on of such business in such locality becomes a nuisance, and may be enjoined." (Citations omitted).

As suggested by this broad definition, nuisance is a flexible area of the law that is adaptable to a wide variety of factual situations. We have decided nuisance cases involving land being used for rock concerts, *Berkeley County Comm'n v. Shiley*, __ W. Va. __, 295 S.E.2d 924 (1982), a school site near an airport, *Sticklen v. Kittle*, __W. Va. __, 287 S.E.2d 148 (1981), dust created by coal trucks, *West v. National Mines Corp.*, __ W. Va. __, 285 S.E.2d 670, 25 A.L.R.4th 1179 (1981), an automobile junk yard, *Mahoney v. Walter*, 157 W. Va. 882, 205 S.E.2d 692 (1974), a used car lot, *Martin v. Williams*, *supra*, a rail tramroad built on a public road, *Hark v. Mountain Fork Lumber Co.*, *supra*, a house of prostitution, *State v. Navy*, 123 W. Va. 722, 17 S.E.2d 626 (1941), an automobile garage built out of inflammable materials, *Harris v. Poulton*, 99 W. Va. 20, 127 S.E. 647, 40 A.L.R. 334 (1925), fences, *Donohoe v. Fredlock*, 72 W. Va. 712, 79 S.E. 736 (1913), coal smoke and soot emitted by a dye works plant, *Parker v. City of Fairmont*, 72 W. Va. 688, 79 S.E. 660 (1913), a carpenter shop with a steam engine, *Wood v. City of Hinton*, 47 W. Va. 645, 35 S.E. 824 (1900), damage to property adjacent to a railroad track, *Guinn v. Ohio River R.R. Co.*, 46 W. Va. 151, 33 S.E. 87 (1899), a merry-go-round, *Town of Davis v. Davis*, 40 W. Va. 464, 21 S.E. 906 (1895), an explosives factory, *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 21 S.E. 1035 (1895), a house built partially on city property, *Teass v. City of St. Albans*, 38 W. Va. 1, 17 S.E. 400 (1893), noise from a factory, *Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804, 12 S.E. 1085 (1891), and an obstruction of a public road *Keystone Bridge Co. v. Summers*, 13 W. Va. 476 (1878).

Nuisance law has been particularly effective in addressing environmental problems. In W. Rodgers, Jr.,

Handbook on Environmental Law § 2.1 at 100 (1977), the following statement is made:

> "There is simply no common law doctrine that approaches nuisance in comprehensiveness or detail as a regulator of land use and of technological abuse. Nuisance actions have involved pollution of all physical media—air, water, land—by a wide variety of means .... Nuisance actions have challenged virtually every major industrial and municipal activity which is today the subject of comprehensive environmental regulation—the operation of land fills, incinerators, sewage treatment facilities, activities at chemical plants, aluminum, lead and copper smelters, oil refineries, pulp mills, rendering plants, quarries and mines, textile mills and a host of other manufacturing activities .... Nuisance theory and case law is the common law backbone of modern environmental and energy law."[4]

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4. A number of articles discuss the possible application of nuisance law to hazardous wastes and the problem of selecting appropriate sites for hazardous waste disposal facilities. *See, e.g.*, Duffy, *State Hazardous Waste Facility Siting: Easing the Process Through Local Cooperation and Preemption*, 11 B.C. Envtl. Aff. L. Rev. 755 (1984); Harrington, *The Right to a Decent Burial: Hazardous Waste and its Regulation in Wisconsin*, 66 Marq. L. Rev. 223 (1983); Tarlock, *Anywhere But Here: An Introduction to State Control of Hazardous-Waste Facility Location*, 14 Land Use & Env't L. Rev. 533 (1983); Trauberman, *Common Law Nuisance in Hazardous Waste Litigation: Has it Survived Milwaukee II?*, 13 Envtl. L. Rep. 10043 (1983); Comment, *Hazardous Waste Liability and Compensation: Old Solutions, New Solutions, No Solutions*, 14 Conn. L. Rev. 307 (1982); Comment, *Hazardous Waste Cleanup in Wyoming: Legal Tools Available to the Private Citizen*, 19 Land & Water L. Rev. 395 (1984); Comment, *Changes in the Ownership of Hazardous Waste Disposal Sites: Original and Suc-*

Having determined that the ordinance is directed at abating a public nuisance condition, rather than a regulatory ordinance designed to deal with the management and control over the disposal of hazardous wastes, we will now address the specific objections made by Sharon Steel against the ordinance's validity.

I.

An assertion of federal pre-emption is a claim easily made but difficult to apply in a given case because of the enormous variety of legislative overlap that occurs between federal, state, and local enactments.[5] In this case,

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cessor Liability, 67 Marq. L. Rev. 691 (1984); Comment, *Remedies for Hazardous Waste Injuries*, 11 N. Ky. L. Rev. 435 (1984); *Utah's Hazardous Waste Facility Siting Act: Burying Private and Local Interests to Facilitate Siting?*, 1983 Utah L. Rev. 327. For an example of a case where an action based on nuisance was successfully prosecuted against an operator of a hazardous waste facility, see *Village of Wilsonville v. SCA Services, Inc.*, 86 Ill. 2d 1, 55 Ill. Dec. 499, 426 N.E.2d 824 (1981).

5. In *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Marketing & Bargaining Bd.*, — U.S. —, —, 81 L. Ed. 2d 399, 406, 104 S. Ct. 2518, 2523 (1984), this summary of federal pre-emption principles is made:

> "Federal law may pre-empt state law in any of three ways. First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law .... Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government .... Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises

Sharon Steel does not argue that the federal RCRA pre-empts our WVHWMA.[6]

We decline to make any detailed discussion of the federal pre-emption doctrine in this case because we find that both the RCRA and our WVHWMA do not conflict with and therefore do not pre-empt the City's ordinance. Both acts have similarly worded savings clauses, 42 U.S.C. 6972(f),[7] and W. Va. Code, 20-5E-18(d), which state that nothing in the acts shall restrict any right any person may have under any statute or common law to seek enforcement of any standard or requirement relating to hazardous wastes or to seek any other relief. Fur-

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when compliance with both state and federal law is impossible . . . or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (Citations omitted).

6. Under 42 U.S.C. § 6926, states are permitted to adopt a hazardous waste program which, when it meets the federal standards, operates in lieu of the RCRA. In *Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091, 1096-97, 456 A.2d 94, 97 (1982), the court recognized this fact and quoted from House committee reports indicating that the congressional intent was to permit a state to take over the hazardous waste program:

"For example, a House committee report on the RCRA states:

> 'It is the Committee's intention that the States are to have primary enforcement authority and if at anytime a State wishes to take over the hazardous waste program it is permitted to do so, provided that the State laws meet the Federal minimum requirements for both administering and enforcing the law.'

H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 24, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6238, 6262."

7. 42 U.S.C. § 6972(f) provides:

"Nothing in this section shall restrict any right which any person (or class of persons) may have

thermore, W. Va. Code, 20-5E-18(h),[8] preserves the right of any person to bring an action based on nuisance.

These provisions indicate that Congress and our State legislature intended to preserve the rights of any person to file an action relating to hazardous wastes based on either statutory or common law grounds. The United States Supreme Court, in interpreting similar savings clauses in other federal environmental acts, has held that such provisions do not preserve the right to bring an action based upon federal common law, but has indicated that actions based upon other statutes or state common law would be preserved. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 n.31, 69 L. Ed. 2d 435, 451 n.31, 101 S. Ct. 2615, 2626-27 n.31 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 327-29, 68 L. Ed. 2d 114, 132-34, 101 S. Ct. 1784, 1797-99 (1981).

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under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency)."

8. W. Va. Code, 20-5E-18(h), provides:

"Notwithstanding any provision of this article to the contrary, any person may maintain an action to enjoin a nuisance against any permit holder or other person subject to the provisions of this article and may seek damages in said action, all to the same extent and for all intents and purposes as if this article were not enacted if such person maintaining such action and seeking such damages would otherwise have standing to maintain such action and be entitled to damages by any other rule of law."

See also W. Va. Code, 20-5E-10 (Facilities in existence at the time WVHWMA became effective that would now be required to have a permit shall operate "in such a manner as will not cause or create a substantial risk of a health hazard or a public nuisance or a significant adverse effect upon the environment.").

We have found only a few cases addressing the issue of whether an action based upon a state's common law of nuisance can be maintained without being pre-empted by the RCRA. In *Environmental Defense Fund, Inc. v. Lamphier,* 714 F.2d 331, 337 (4th Cir. 1983), where State agencies and citizens sought to enjoin the continued operation of an industrial waste disposal facility on a nuisance theory, the Fourth Circuit held:

> "Under the citizen suit provision of RCRA, 42 U.S.C. § 6972, the district court is authorized to enforce RCRA regulations or orders, presumably to the full extent of its legal and equitable powers. 42 U.S.C. § 6972(a). Provided plaintiffs are genuinely acting as private attorneys general rather than pursuing a private remedy, nothing in RCRA . . . bars injunctive relief. *See* 42 U.S.C. § 6928." (Footnote omitted).[9]

The court also rejected the contention that the state's hazardous waste act had pre-empted an action based upon the state's common law of nuisance.

In *Neal v. Darby,* 282 S.C. 277, 318 S.E.2d 18 (S.C. App. 1984), the challenged chemical company conceded that neither the RCRA nor the state's hazardous waste management act pre-empted an action based on nuisance. *See also State v. Schenectady Chemicals, Inc.*, 103 A.D.2d 33, 479 N.Y.S.2d 1010 (1984) (State common law nuisance action against chemical company responsible for disposing of chemical wastes held not pre-empted by federal environmental legislation); *State v. Monarch Chemicals, Inc.*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (1982) (State common law nuisance action to abate soil and water contami-

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9. It should be noted that 42 U.S.C. § 6972(a) specifically enables citizens to seek enforcement of the RCRA after giving the government notice to first proceed to correct the condition.

nation held not pre-empted by federal legislation, including RCRA); *cf. Krueger v. Mitchell*, 112 Wis. 2d 88, 332 N.W.2d 733 (1983) (State common law nuisance action against noise created by airport held preserved by savings clause in federal legislation).

The present situation is somewhat analogous to *Exxon Corp. v. Eagerton*, 462 U.S. 176, 76 L. Ed. 2d 497, 103 S. Ct. 2296 (1983), where the United States Supreme Court addressed the question of whether the Natural Gas Pricing Act (NGPA) pre-empted an Alabama statute which prohibited oil and gas producers from passing on severance tax increases to their customers. The United States Supreme Court concluded that the NGPA pre-empted the pass-through provision on sales of gas in interstate commerce. However, after analyzing the NGPA and particularly Section 602(a), 15 U.S.C. § 3432(a), which allows states to set lower prices on intrastate sales below that set by the NGPA for interstate sales, the Supreme Court concluded:

> "We reach a different conclusion with respect to the application of the pass-through prohibition to sales of gas in intrastate commerce. Although § 105(a) of the NGPA extended federal authority to control prices to the intrastate market, 15 U.S.C. § 3315(a) (1976 ed., Supp. V), Congress also provided that this extension of federal authority did not deprive the States of the power to establish a price ceiling for intrastate producer sales of gas at a level lower than the federal ceilings." 462 U.S. at 186, 76 L. Ed. 2d at 507, 103 S. Ct. at 2303. (Footnote omitted).

See Pennzoil Co. v. Public Service Comm'n, ___ W. Va. ___, 327 S.E.2d 444 (1985).

The lesson of *Exxon* is that a federal statute will not be deemed to pre-empt a state or municipal enactment where the federal statute clearly exempts the subject matter of the state or municipal enactment from the ambit of the federal act. Here, the provisions in 42 U.S.C. § 6972(f) of the RCRA and W. Va. Code, 20-5E-18(d), of the WVHWMA preserve other statutory and State common law rights with regard to the management of hazardous wastes.

We are not persuaded by Sharon Steel's argument that we should follow the holdings of *Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091, 456 A.2d 94 (1982), and *Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury*, 371 So.2d 1127 (La. 1979). In *Stablex*, the challenged ordinance required approval of the voters in the town before a hazardous waste facility could be established therein. The court found the ordinance to be pre-empted by the comprehensive statewide regulation of hazardous wastes. The ordinance in *Rollins* completely banned any hazardous waste facility within the parish and was held to be void because of the extensive federal and state regulation in the area of hazardous wastes.

These two cases are inapplicable because neither dealt with the authority of a municipality or parish to abate public nuisances, which is the focus of the present case. Furthermore, as the City points out, the Louisiana legislature amended its Hazardous Waste Management Act, La. Rev. Stat. Ann. § 30:1144(B), to, in effect, reverse the *Rollins* decision and allow parishes to pass ordinances banning or zoning out hazardous waste facilities. Here, the ordinance does not completely ban hazardous waste disposal facilities, but is directed at those that

pose a substantial danger to human health or the environment.

We, therefore, conclude that because both the RCRA and the WVHWMA have provisions preserving common law actions, including nuisance actions, an ordinance passed by a municipality declaring the permanent disposal of hazardous wastes as therein defined to be a public nuisance is not pre-empted by either the federal or State acts.

II.

Sharon Steel's argument that the City lacks the power to enact a hazardous waste ordinance rests upon our familiar law regarding the limited powers of municipalities recently set out in Syllabus Point 1 of *City of Fairmont v. Investors Syndicate of America, Inc.*, ___ W. Va. ___, 307 S.E.2d 467 (1983):

> " 'A municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied.' Syllabus Point 2, *State ex rel. Charleston v. Hutchinson*, 154 W. Va. 585, 176 S.E.2d 691 (1970)."

See also Syllabus Point 2, *Hyre v. Brown*, 102 W. Va. 505, 135 S.E. 656, 49 A.L.R. 1230 (1926).

We again stress that the ordinance is not a regulatory enactment, but is instead a penal ordinance designed to codify the common law of nuisance. We agree with the City's assertion that a municipality has the authority to declare the improper permanent disposal of hazardous wastes a public nuisance under W. Va. Code, 8-12-5(23), which empowers municipalities "[t]o provide

for the elimination of hazards to public health and safety," where the term "hazardous waste" in the ordinance is defined, in part, as material which poses a substantial present or potential hazard to human health or the environment.[10] Additional powers which further support the City's authority to pass the ordinance can be found in the following subsections of W. Va. Code, 8-12-15: (10) (authorizing regulation of garbage, trash, wastes, and other similar matters); (13) (authorizing the prevention of anything that is dangerous, offensive, or unwholesome to the public); and (44) (authorizing the protection and promotion of public morals, safety, health, welfare, and good order).

Admittedly, none of these subsections specifically refer to hazardous wastes, but there is no question from our cases that we have always considered these provisions to be a sufficient grant of authority enabling municipalities to abate public nuisances. In *Parker v. City of Fairmont*, 72 W. Va. 688, 79 S.E. 660 (1913), we discussed an earlier counterpart to W. Va. Code, 8-12-5(23), and concluded in Syllabus Point 1:

> "Under the provision of the charter of the city of Fairmont, same as Code, ch. 47, sec. 28, that 'the council shall have power to abate or cause to be abated anything which, in the opinion of a majority of the whole council, shall be a nuisance,' the council may abate only that as a nuisance which is recognized as such *per se*, or branded as such by lawful statute or ordinance."

---

10. W. Va. Code, 8-12-5(23), states that a municipality is empowered "[t]o provide for the elimination of hazards to public health and safety and to abate or cause to be abated anything which in the opinion of a majority of the governing body is a public nuisance."

See also Syllabus Point 1, *Donohoe v. Fredlock*, 72 W. Va. 712, 79 S.E. 736 (1913); *Wood v. City of Hinton*, 47 W. Va. 645, 35 S.E. 824 (1900); *Town of Davis v. Davis*, 40 W. Va. 464, 21 S.E. 906 (1895).

It is generally recognized that even though a municipality has the power to enact an ordinance declaring some activity or thing to be a nuisance, such a declaration does not mean that the municipality is relieved of its burden to show that the activity or thing is in fact a nuisance when it seeks to enforce its ordinance. *See Yates v. City of Milwaukee*, 77 U.S. (10 Wall.) 497, 19 L. Ed. 984 (1870); *City of Russellville v. Vulcan Materials Co.*, 382 So.2d 525 (Ala. 1980); *City of Denver v. Mullen*, 7 Colo. 345, 3 P. 693 (1884); *Jewel Tea Co. v. Town of Bel Air*, 172 Md. 536, 192 A. 417 (1937); *Potashnick Truck Service, Inc. v. City of Sikeston*, 351 Mo. 505, 173 S.W.2d 96 (1943); *Painter v. Town of Forest Acres*, 231 S.C. 56, 97 S.E.2d 71 (1957); *City of Houston v. Lurie*, 148 Tex. 391, 224 S.W.2d 871, 14 A.L.R.2d 61 (1949); *Eno v. City of Burlington*, 125 Vt. 8, 209 A.2d 499 (1965); 6 E. McQuillin, The Law of Municipal Corporations § 24.83 (3d ed. 1980); 58 Am. Jur. 2d *Nuisances* § 172 (1971).

We have adopted a rather similar approach in the cases we have decided under the antecedent of W. Va. Code, 8-12-5(23). In *Teass v. City of St. Albans*, 38 W. Va. 1, 17 S.E. 400 (1893), we held that even though a municipality declares in an ordinance that something is a public nuisance, this does not give the municipality the authority to abate the nuisance without first prosecuting the matter in a court. In *Parker*, 72 W. Va. at 690-91, 79 S.E. at 661-62, we acknowledged that a municipality has the power to enact an ordinance declaring a matter a nuisance, but noted:

> "That provision can not rightly be construed to mean that the council may determine that to be a nuisance which is not such by the common law, by statute, or by ordinance. It gives power to abate nuisances, not to determine what shall be considered nuisances. It plainly relates to nuisances *per se*, those primarily branded as such by the law . . . . The charter provision grants a police power of abatement; not an arbitrary power of determining that something is a nuisance which by no law is known to be such. It is not reasonable to presume that the Legislature meant to grant such arbitrary power to the municipal authorities. True, the opinion of the majority of the whole council is called for by the provision. But that opinion is to be applied in discerning that the thing complained of comes within the category of nuisances pronounced to be such by law. Clearly the power granted is to abate what the law holds to be a nuisance, not to enact that any particular thing is a nuisance."

We have more recently held that whether some activity or thing is a nuisance is generally a question of fact, as stated in Syllabus Point 3 of *Sticklen v. Kittle*, ___ W. Va. ___, 287 S.E.2d 148 (1981):

> "As a general rule, a fair test as to whether a particular use of real property constitutes a nuisance is the reasonableness or unreasonableness of the use of the property in relation to the particular locality involved, and ordinarily such a test to determine the existence of a nuisance raises a question of fact."

See also Mahoney v. Walter, 157 W. Va. 882, 205 S.E.2d 692 (1974).

Therefore, we conclude that while the ordinance declares the permanent disposal of hazardous wastes, as

therein defined, within the City of Fairmont to be a public nuisance, the issue of whether a given site is a public nuisance is a question of fact dependent upon the circumstances existing at such site. We, however, affirm the power of the City to enact such an ordinance as we believe by its terms, under the definition of "hazardous waste," a common law nuisance is defined.

III.

The final argument presented is that the ordinance is so arbitrary and unreasonable that it violates substantive due process standards. The substantive due process standard that we apply to legislative enactments is summarized in Syllabus Point 1 of *State v. Wender*, 149 W. Va. 413, 141 S.E.2d 359 (1965), *overruled on other grounds, Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, ___ W. Va. ___, 328 S.E.2d 144 (1984):

> "The legislature is vested with a wide discretion in determining what the public interest requires, the wisdom of which may not be inquired into by the courts; however, to satisfy the requirements of due process of law, legislative acts must bear a reasonable relationship to a proper legislative purpose and be neither arbitrary nor discriminatory."

See also DeCoals, Inc. v. Board of Zoning Appeals, ___ W. Va. ___, 284 S.E.2d 856 (1981); *Thorne v. Roush*, ___ W. Va. ___, 261 S.E.2d 72 (1979); *O'Neil v. City of Parkersburg*, 160 W. Va. 694, 237 S.E.2d 504 (1977); *State ex rel. Harris v. Calendine*, 160 W. Va. 172, 233 S.E.2d 318 (1977). We noted in *Hartsock-Flesher Candy Co.* that substantive due process challenges to legislative enactments are not now generally favored.

Fairmont's City Council stated several reasons in the preamble of its ordinance for addressing the issue of hazardous waste disposal:

> "The City Council finds that permanent disposal of hazardous wastes within the City is a nuisance in that it may depreciate property values; have an adverse impact on the City's ability to attract new business and industry and encourage expansion of existing business and industry; create a continuing serious anxiety and concern among city residents and visitors concerning the existence of a permanent hazardous waste disposal site within the city, all of which are offensive and constitute injury and annoyance to the public and individuals."

As previously noted, the City has the authority under its police powers to protect the health and safety of its citizens as well as to ensure the economic integrity of the City. We find the City's exercise of its authority to abate public nuisances to be a responsible and reasonable approach to the problems potentially presented by permanent hazardous waste facilities which are substantially hazardous to the human health or the environment.

Sharon Steel argues that Section 2 of the ordinance makes an arbitrary and discriminatory distinction between permanent hazardous waste disposal and temporary hazardous waste storage. Additionally, Sharon Steel argues that the ordinance does not address the problems of hazardous waste transportation and generation within the City. We are not presented with a sufficiently developed record to determine if the distinction between permanent disposal and temporary storage of hazardous wastes is indeed arbitrary and discriminatory. We doubt whether this would raise a substantive due process issue because an action based on the common law of public

nuisance could also be brought against a person temporarily storing hazardous wastes. W. Va. Code, 20-5E-18(h). Consequently, we hold that the ordinance does not violate substantive due process.

For the foregoing reasons, we conclude that Fairmont's Ordinance No. 597 is valid and affirm the decision of the Circuit Court of Marion County.

Affirmed.

APPENDIX B

ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA WITH RESPECT TO PETITION FOR REHEARING

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 3rd day of June, 1985, the following order was made and entered, to-wit:

Sharon Steel Corporation, Plaintiff Below, Appellant

vs.

City of Fairmont, West Virginia, Edwin C. Daley, City Manager of Fairmont, West Virginia, and George R. Higinbotham, City Attorney of Fairmont, West Virginia, Defendants Below, Appellees

Upon an appeal from a judgment of the Circuit Court of Marion County rendered on the 13th day of April, 1984.

The Court having maturely considered the transcript of the record herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is no error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Marion County rendered on the 13th day of April, 1984, be, and the same is hereby, affirmed, and that the appellees do recover of and from the appellant their costs about their defense in this Court in this behalf expended, and Thirty Dollars damages; all of which is ordered to be certified to the Circuit Court of Marion County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Miller, was concurred in by Chief Justice Neely and Justices McGraw, McHugh and Brotherton. A True Copy

Attest:/s/ GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

APPENDIX C

OPINION OF THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

February 22, 1984

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Re: Sharon Steel Corporation v.
City of Fairmont, et al.
Civil Action No. 83-C-392

Gentlemen:

Regarding the motions pending in the above captioned civil action, I have reviewed the memoranda submitted by both parties, as well as my notes of the legal arguments advanced at the hearing on February 10, 1984.

It is my opinion that Fairmont City Ordinance 597 withstands the test of validity, and that the temporary injunctive relief against its enforcement, granted by the Supreme Court of Appeals of West Virginia, should be dissolved.

Specifically, my findings and rulings are as follows:

(1) Both case law and the specific language of the Federal Resource, Conservation, and Recovery

Act ("RCRA"), 42 U.S.C. §6901 *et seq.*, indicate that the Fairmont ordinance and other similar state and local laws are not meant to be pre-empted by the federal legislation.

(2) Ordinance 597 is not designed to regulate the disposal of hazardous waste. Rather, it was adopted to deal with a nuisance, and is within the purview of the plenary power granted municipalities by West Virginia Code §8-12-5.

(3) West Virginia Code §20-5E-1, *et seq.*, ("HWMA") does not restrict the rights of municipalities to deal with what they deem to be "nuisances."

(4) Ordinance 597 is neither arbitrary nor unreasonable, under the circumstances; indeed, it bears a real and substantial relation to the public health, safety and general welfare.

I am somewhat troubled by the holdings in the cases of *Environmental Services v. Iberville*, 371 So.2d 1127 (La. 1979) and *Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091, 456 A.2d 94 (1982), which are state court cases pretty much in point with the instant case. They are, however, distinguishable. The *Environmental Services* case involved a "parish" (the equivalent of our "county") ordinance, and holds that the end result might be similar actions by all parishes which would severely stifle the affected industry throughout the state. I believe the instant situation to be somewhat unique within this State, and thus the effect of Ordinance 597 will not be far-reaching. Further, I do not believe the ultimate effect of Ordinance 597 would be to frustrate West Virginia's comprehensive statewide regulatory scheme, as happened in the *Stablex Corporation* case.

Finally, there can be no question but that the right of a landowner to use his land as he sees fit is a right which must be strenuously protected. However, what plaintiff seeks to do with this land (and what is prohibited by Ordinance 597) contravenes and, in my opinion, threatens the public welfare. Surely in a state as rural as West Virginia, a better site for disposal of hazardous waste can be found than one which is within the city limits, and virtually in the middle of, this State's seventh largest city (U.S. Census, 1980).

Counsel for the defendant is directed to prepare an Order reflecting this ruling, attaching thereto a copy of this letter opinion, and present same to opposing counsel for initialing and subsequent entry. The Order should provide for a stay of thirty (30) days to allow plaintiff an opportunity to appeal.

Very truly yours,

/s/ FRED L. FOX, II
Fred L. Fox, II

FLF,II:le
cc: Court file

APPENDIX D

ORDER OF THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

IN THE CIRCUIT COURT OF MARION COUNTY,
WEST VIRGINIA
DIVISION II

SHARON STEEL CORPORATION, Plaintiff, v. THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia, Defendants.	CIVIL ACTION No. 83-C-392

ORDER

Came plaintiff, by counsel, and defendants, by counsel, upon the parties' cross-motions for summary judgment as to the legal validity of City of Fairmont Ordinance 597 and upon defendants' motion to dissolve the temporary injunction heretofore awarded plaintiff against defendants on the 29th day of July, 1983. It appearing to the Court from the pleadings that there is no genuine issue of fact concerning the cross-motions for summary judgment as to the legal validity of Ordinance 597, and the parties having represented the same to the Court; and after hearing the arguments of counsel, the Court is of the opinion to and doth find the following facts and make the following conclusions of law:

1. Both case law and the specific language of the federal Resource, Conservation, and Recovery Act, 42 U.S.C. §6901 *et seq.*, indicate that the Fairmont ordinance and other similar state and local laws are not meant to be preempted by the federal legislation.

2. Ordinance 597 is not designed to regulate the disposal of hazardous waste. Rather, it was adopted to deal with a nuisance, and is within the purview of the plenary power granted municipalities by West Virginia Code §8-12-5.

3. West Virginia Code §2-5E-1 *et seq.*, does not restrict the rights of municipalities to deal with what they deem to be "nuisances".

4. Ordinance 597 is neither arbitrary nor unreasonable, under the circumstances; indeed, it bears a real and substantial relation to the public health, safety and general welfare.

5. There is no just reason for delay in entering judgment on the cross-motions as to the legal validity of Ordinance 597.

Accordingly, it is ORDERED that plaintiff's motion be and the same is hereby denied; that defendants' motion for summary judgment on Count 4 of their Counterclaim as to the legal validity of Ordinance 597 and motion to dissolve the temporary injunction be and the same are hereby granted, and that judgment hereon be entered, and the same is hereby entered, reserving unto plaintiff its objections and exceptions, and further staying the execution of this judgment and the dissolution of the injunction for a period of thirty (30) days from entry of this order in which time plaintiff may appeal.

It is further ORDERED that the Court's letter opinion of February 22, 1984 be made a part hereof by reference.

ENTER:

.....
JUDGE

APPENDIX E

NOTICES OF APPEAL

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

SHARON STEEL CORPORATION, Appellant, v. THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia, Appellees.	No. 16349

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Sharon Steel Corporation, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of West Virginia entered herein on June 3, 1985 (rehearing denied July 10, 1985).

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ ROBERT W. THOMSON
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ALFRED J. LEMLEY

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Counsel for Appellant
Sharon Steel Corporation

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

DIVISION II

SHARON STEEL CORPORATION, Plaintiff, v. THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia, Defendants.	CIVIL ACTION No. 83-C-392

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Sharon Steel Corporation, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the June 3, 1985 order of the Supreme Court of Appeals of West Virginia (rehearing denied July 10, 1985) affirming the order of the Circuit Court of Marion County, West Virginia, Division II, entered herein on April 13, 1984.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ ROBERT W. THOMSON
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Counsel for Plaintiff
Sharon Steel Corporation

APPENDIX F

LIST OF PARENTS, SUBSIDIARIES AND AFFILIATES PURSUANT TO SUPREME COURT RULE 28.1

Appellant Sharon Steel Corporation's stock is 86% owned by NVF Company.

Subsidiaries of Sharon Steel Corporation include Carpentertown Coal & Coke Co., Macomber, Inc., Sharon Building & Land Corp., Sharonsteel Products Co., Union Steel Corp., Summit Systems, Inc., Alaska Gold Co., Arava Exploration Co., Kennet Company Ltd., Mueller Brass Co., Itawamba Industrial Gas Co., Inc., Mueller Industrial Realty Co., Streamline Copper & Brass Ltd., United States Fuel Co., King Coal Co., Ussram Exploration Co., U.S.S. Lead Refinery, Inc., United States Smelting Refining & Mining Co., Utah Railway Co., Washington Mining Co. and White Knob Mining Co.

Subsidiaries of NVF Company, in addition to Sharon Steel Corporation, include NVF Industries of Canada, Ltd., NVF Europe, S.A., NVF Export Ltd., The Steel Corp. of Texas, APL Corp.

Affiliates of NVF Company include National Can Corp., Burnup & Sims Inc., Howell Industries, City Investing Co., Evans-Products Co., Johnson Controls, Inc., Insurance and Risk Management, Inc.

APPENDIX G

FAIRMONT ORDINANCE NO. 597

ORDINANCE NO. 597

AN ORDINANCE PROHIBITING PERMANENT DISPOSAL OF HAZARDOUS WASTE; PENALTIES; DECLARATION OF NUISANCE; NOT APPLICABLE TO STORAGE OF WASTE PRODUCTS OF BUSINESS OPERATIONS COMPLYING WITH STATE AND FEDERAL STANDARDS.

WHEREAS, West Virginia Code 8-12-5 given [sic] plenary power and authority for municipalities to control and administer waterfronts and waterways; to prohibit the accumulation and require the disposal of garbage, refuse, waste, ashes, trash and other similar matters; to prevent injury or annoyance to the public or individuals from anything dangerous, offensive or unwholesome; to project and promote the public morals, safety, health, welfare and good order; to provide for the elimination of hazards to public health and safety and to abate or cause to be abated anything which in the opinion of a majority of the governing body is a public nuisance; and

WHEREAS, the City Council finds that permanent disposal of hazardous wastes within the City is a nuisance in that it may depreciate property values; have an adverse impact on the City's ability to attract new business and industry and encourage expansion of existing business and industry; create a continuing serious anxiety and concern among city residents and visitors concerning the existence of a permanent hazardous waste disposal site within the city, all of which are offensive and constitute injury and annoyance to the public and individuals; and

WHEREAS, the City Council finds that prohibition of the permanent disposal of hazardous waste will protect and promote the public morals, safety, health, welfare and good order in the City;

NOW THEREFORE THE CITY OF FAIRMONT HEREBY ORDAINS THAT:

SECTION 1. *Definitions:* "Permanent Disposal" or "Permanently Dispose" means the discharge, deposit, injection, dumping, spilling, leaking or placement of any hazardous waste into, on, above, or below any land or water which waste is to remain or which has remained at a disposal site within the City for a continuous period of five years and which is not intended to be removed from such site.

"Hazardous Waste" means a waste or combination of wastes, which because of its quantity, concentration or physical, chemical or infectious characteristics, may cause, or significantly contribute to an increase in mortality, or an increase in serious irreversible, or incapacitating reversible illness, or pose a substantial present or potential hazard to human health or the environment when stored. Provided, however, that hazardous wastes shall include only those whose disposal would require a state or federal hazardous waste permit.

"Person" means any individual, trust, firm, joint stock company, public or private or governmental corporation, partnership, association, state or federal agency.

"Storage" means the otherwise local containment of hazardous wastes which wastes are not intended to be permanently disposed of at any site within the City.

"Waste" means any garbage, refuse, sludge, and other discarded material including solid, liquid, semi-solid, or contained gaseous material resulting from in-

dustrial, commercial mining and agricultural operations, but does not include solid or dissolved material in domestic sewage.

SECTION 2. *Prohibition:* It shall be unlawful for any person to permanently dispose or attempt to permanently dispose of hazardous waste within the City. Provided, however, that storage of hazardous wastes by duly licensed and taxpaying enterprises shall not be prohibited.

SECTION 3. *Nuisance:* In the event any person shall dispose or establish a site for the permanent disposal of hazardous waste in violation of the provisions of this Ordinance, the City Attorney is authorized, upon instructions from the City Manager, in addition to other penalties set forth herein, to institute any appropriate civil action or proceedings to prevent such disposal of hazardous waste, the same being deemed a public nuisance.

SECTION 4. *Penalties:* Any person who shall violate a provision of this Ordinance or fail to comply with any of the requirements hereof shall be guilty of a misdemeanor, punishable by a fine of not more than Five Hundred Dollars, or by imprisonment not exceeding thirty days, or both fine and imprisonment. Each day that a violation continues or has not been totally abated shall be deemed a separate offense.

Supreme Court, U.S.
FILED
OCT 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-616

IN THE

Supreme Court of the United States

October Term, 1985

SHARON STEEL CORPORATION,
Appellant,

v.

THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUPPLEMENTAL APPENDICES TO JURISDICTIONAL STATEMENT

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Counsel for Appellant Sharon Steel Corporation

**Counsel of Record for Appellant*

HERBICK & HELD PRINTING COMPANY, PITTSBURGH, PA. 15233-2182

Appellant's Jurisdictional Statement is hereby supplemented by deleting from the Appendices thereto Appendix B and substituting therefor new Appendices A-1 and B, as set forth on the following pages, being:

APPENDIX A-1—Order of the Supreme Court of Appeals of West Virginia 23b

APPENDIX B — Order of the Supreme Court of Appeals of West Virginia with Respect to Petition for Rehearing . 24a

APPENDIX A-1

ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 3rd day of June, 1985, the following order was made and entered, to-wit:

Sharon Steel Corporation, Plaintiff Below, Appellant

vs.

City of Fairmont, West Virginia, Edwin C. Daley, City Manager of Fairmont, West Virginia, and George R. Higinbotham, City Attorney of Fairmont, West Virginia, Defendants Below, Appellees

Upon an appeal from a judgment of the Circuit Court of Marion County rendered on the 13th day of April, 1984.

The Court having maturely considered the transcript of the record herein, and the argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is no error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Marion County rendered on the 13th day of April, 1984, be, and the same is hereby, affirmed, and that the appellees do recover of and from the appellant their costs about their defense in this Court in this behalf expended, and Thirty Dollars damages; all of which is ordered to be certified to the Circuit Court of Marion County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Miller, was concurred in by Chief Justice Neely and Justices McGraw, McHugh and Brotherton. A True Copy

Attest:/s/ GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

APPENDIX B

ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA WITH RESPECT TO PETITION FOR REHEARING

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 10th day of July, 1985, the following order was made and entered, to-wit:

Sharon Steel Corporation, Plaintiff Below, Appellant

vs.

City of Fairmont, West Virginia, Edwin C. Daley, City Manager of Fairmont, West Virginia, and George R. Higinbotham, City Attorney of Fairmont, West Virginia, Defendants Below, Appellees

The Court having maturely considered the petition for rehearing and reargument filed in the captioned case is of opinion to and doth hereby, deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest:/s/ GEORGE W. SINGLETON
Clerk Supreme Court of Appeals

Supreme Court, U.S.
FILED
OCT 29 1985
JOSEPH F. SPANIOL, JR
CLERK

(3)

No. 85-616

IN THE

Supreme Court of the United States

October Term, 1985

SHARON STEEL CORPORATION,

Appellant,

v.

THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

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OPINION BELOW

This is an appeal from a decision of the Supreme Court of Appeals of the State of West Virginia rejecting appellant's contention that the Resource Conservation and Recovery Act of 1976, as amended, (RCRA), 42 USCA § 6901 *et seq*, preempts a municipal ordinance which prohibits the disposal of hazardous waste virtually in the middle of the seventh largest city in the State of West Virginia.

JURISDICTION

The jurisdictional requisites are adequately set forth in the appellant's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are set forth in the appellant's jurisdictional statement.

STATEMENT OF THE CASE

Appellant does not take issue with the statement of the case as set forth in the appellant's jurisdictional statement, except to say that in 1979 Sharon permanently ceased operations in the City of Fairmont as the result of a consent decree arising from a complaint filed by the United States for violation of the Clean Air Act.[1] From the time of the closure of the facility until the State high court's decision, Sharon has maintained an unpermitted hazardous waste dump.

---

[1] *United States v. Sharon Steel Corporation, Civil Action No. 79-0011-C(H) (N.D. W. Va.)*

ARGUMENT

THIS APPEAL LACKS A SUBSTANTIAL FEDERAL QUESTION.

Appellant contends that the decision of the West Virginia Supreme Court of Appeals will:

1. Thwart Congress' comprehensive national plan for managing hazardous waste;

2. Directly conflict with the national permit program under RCRA; and

3. Promote the proliferation of local vetoes of federal hazardous waste facility permitting decisions.

Appellant's contentions have no merit whatsoever. RCRA provides that the Administrator of the United States Environmental Protection Agency (EPA) may authorize states to implement their own hazardous waste management programs in lieu of a federally administered program. 42 U.S.C. § 6926 (b). Such authorization occurs after EPA review, public participation and hearing, and a finding by the EPA Administrator that the state program is consistent with and effective as RCRA and the EPA regulations promulgated pursuant thereto. 42 U.S.C. § 6926 (b) and (d).

This Court has interpreted RCRA as placing primary responsibility for the statute's administration and enforcement in the hands of state regulatory agencies[2] such as, in this case, the West Virginia Department of Natural Resources:

> . . . we find no "clear and manifest purpose of Congress", *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 to preempt the entire field of interstate waste management or transportation either by express statutory command, see *Jones v. Rath Packing Co.*, 430 U.S. 519. 530, 531, or by implicit legislative design, see *City of Burbank v.*

[2] *West Virginia has been authorized by the Administrator to administer and enforce a state hazardous waste program to be consistent with RCRA.*

Lockheed Air Terminal, 411 U.S. 624, 633. To the contrary, Congress has expressly provided that "the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies. . . 42 U.S.C. § 6901 (a) (4). *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620 fn. 4 (1978).

Moreover, RCRA explicity provides that states and political subdivisions may impose requirements which are more stringent than those imposed by RCRA:

> . . . nothing in this chapter shall be construed to prohibit any state or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such (EPA) regulations. 42 U.S.C. § 6929 (Parenthetical added).

The legislative history of RCRA indicates that Congress intended to allow states to be more stringent than EPA regarding selection of sites for the disposal of hazardous wastes. See 125 Cong. Rec. at 13247-13248. See also H. Dept. No. 96-1444, 96th Cong. 2d. Sess. at 40-41.

West Virginia's approach, as interpreted by the State's Supreme Court in the case at bar, to disposal of hazardous wastes allows cities to prohibit the disposal of hazardous waste within their jurisdiction. The ability of a West Virginia city to prohibit hazardous waste disposal does not in any way thwart reaching the goals of RCRA. West Virginia Code § 8-12-5, providing the general powers of municipalities, authorizes only urban areas, cities, towns and villages, to prohibit hazardous waste disposal. Rural areas outside the jurisdiction of West Virginia municipalities comprise the great majority of the State's 15,475,000 acres and that area is available for hazardous waste disposal. Surely RCRA does not mandate that states must allow hazardous waste disposal in populated urban areas if other more sparsely populated alternative sites are available. It is perfectly reasonable for West Virginia to limit hazardous waste disposal to rural areas. Indeed, state and local decisions to prohibit disposal from certain areas is explicitly recognized in 42 U.S.C § 6929 which relates to state and local requirements for "site selections."

CONCLUSION

In sum, RCRA explicitly recognizes the power of states and authorized political subdivisions to regulate hazardous waste disposal "site selections". Only West Virginia cities, towns and villages are empowered by state law to prohibit hazardous waste disposal within their boundaries. Even if every one of West Virginia's cities, towns and villages were to enact ordinances like the one at bar, there would remain million of acres of rural land where such disposal cannot be prohibited in the manner authorized by West Virginia Code § 8-12-5. Obviously RCRA's objectives can be obtained without forcing urban areas to be the depository of hazardous wastes.

RESPECTFULLY SUBMITTED

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No. 85-616

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THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OPPOSING APPELLEES' MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

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ARGUMENT

In its Motion in the Alternative to Dismiss or Affirm, the City of Fairmont fails to state one reason this appeal lacks a substantial federal question. Indeed, the City acknowledges the substantiality of the two questions presented by proceeding immediately to the merits. The need for plenary review by this Court is further underscored by the City's insistence that its Ordinance No. 597 can prohibit the disposal of hazardous wastes pursuant to a federal permit.

The Court below determined that there was no preemption of the Ordinance because of a subsection of Section 6972(f) of the Resource Conservation and Recovery Act, as amended, 42 U.S.C.A. §6901 *et seq.* (West Supp. 1985), which preserves the rights of citizens to "seek enforcement of any standard or requirement relating to the management of . . . hazardous waste" under any statute or common law. The City makes no attempt to support this novel reasoning. The fact that such an important matter of federal-state relations in the area of environmental management has been decided in this manner, however, argues persuasively that this Court should address the issue.

Rejecting the reasoning of the Court below, the City attempts to mislead this Court into believing that the West Virginia "approach" to hazardous waste management is to allow cities to prohibit disposal of hazardous waste within their boundaries while providing for disposal of such wastes in "rural" areas and that the federal Environmental Protection Agency has approved this "approach". No citation is given to any statute or regulation wherein this "approach" is articulated. Nor is there any citation to EPA approval of this "approach". The reason is clear: the West Virginia Hazardous Waste Man-

agement Act, W.Va. Code §20-5E-1 *et seq.* (HWMA), and the regulations promulgated thereunder, do not express such an "approach". The West Virginia Attorney General and the West Virginia Department of Natural Resources do not espouse such an "approach"—they filed a joint brief with the Court below arguing that the Ordinance is preempted by the HWMA. It is the Ordinance, not any "West Virginia approach", which prohibits and makes criminal the disposal of "*only* those [hazardous wastes the disposal of which] would require a state or federal hazardous waste permit." Fairmont Ordinance No. 597, Section 1 (emphasis added).

The City's reference to a non-determinative footnote in a case decided by this Court under the Commerce Clause[1] is irrelevant to whether there is a substantial federal question in this action and to whether a political subdivision of a state can prohibit an activity allowable pursuant to a federal permit. The answer to the question of whether either Section 6929 or Section 6972(f) of RCRA permits a direct conflict between the exercise of rights pursuant to a federal permit and the law of a local government will have a significant impact on RCRA and related federal environmental programs. This Court should, therefore, address that question.

Finally, Sharon would like to call this Court's attention to a case decided by the Fifth Circuit Court of Appeals after the filing by the parties of all previous materials in this case. In *Rollins Environmental Services (FS), Inc. v. The Parish of St. James*, No. 85-3092 (5th Cir. Nov. 1, 1985)[2], a unanimous panel held that an ordinance of a Louisiana locality which "amounted to an

1. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

2. This case is reproduced as Appendix A to this Brief.

outright prohibition" of disposal of polychlorinated biphenyls within the boundaries thereof was preempted under the Toxic Substances Control Act, as amended, 15 U.S.C. §2601 *et seq.* App. A at p. 2a. (1982).

The *Rollins (St. James)* case, the cases cited by Sharon in its Jurisdictional Statement and the case at bar illustrate the growing response by local communites to attempts to implement a national hazardous waste program. Whether the local law is characterized as a nuisance abatement enactment, as in this case, or as a regulation of "commercial solvent businesses", as in *Rollins (St. James)*, App. A at p. 4a, is immaterial. The fact remains that these local enactments are "outright prohibition[s]" of a federally-sanctioned activity. In *Rollins (St. James)* the Fifth Circuit stated, "[i]f every locality were able to dodge responsibility for and participation in this program through artfully designed ordinances, the national goal of safe, environmentally sound toxic waste disposal would surely be frustrated." App. A at p. 19a. The same is true with respect to the national goal of safe, environmentally sound hazardous waste disposal. The case at bar presents a perfect opportunity for this Court to address the legality of local resistance to the implementation of RCRA and related federal environmental programs.

CONCLUSION

Nothing the City has raised in its Motion diminishes the urgent need for this Court to assert its jurisdiction in this case. The questions presented require plenary consideration by this Court.

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APPENDIX A

ROLLINS ENVIRONMENTAL SERVICES (FS), INC., a Delaware corporation, Plaintiff-Appellant, v. THE PARISH OF ST. JAMES, a political subdivision of the State of Louisiana, et al., Defendants-Appellees

No. 85-3092

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SLIP OPINION

November 1, 1985

Appeal from the United States District Court for the Eastern District of Louisiana, Peter Beer, District Judge, Presiding

OPINION

Before: Goldberg, Reavley and Garwood, Circuit Judges.

GOLDBERG, Circuit Judge:

This case presents a classic confrontation over the principles of federalism. Appellant Rollins has developed a national system of toxic waste disposal facilities and wishes to locate an intermediate processing plant in St. James Parish, Louisiana. No one contends in this case that Rollins' proposed and existing facilities, and its plans for operating them, do not conform to Congress' directives in the Toxic Substances Control Act and to applicable regulations issued by the Environmental Protection Agency. Nevertheless, the Parish, for reasons that are not difficult to comprehend, does not want this or any other toxic waste proposal facility located within its boundaries. After passing an ordinance that explicitly prohibited the type of toxic waste disposal at issue here, the Parish settled on a version that accomplished indi-

rectly what the earlier ordinance set out to accomplish directly. The district court, Beer, J., found as a fact that the second ordinance amounted to an outright prohibition of Rollins' activities, but decided ultimately that it lacked subject matter jurisdiction over the case. We hold that there was jurisdiction and conclude that the challenged ordinance has been preempted by the Toxic Substances Control Act.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff-appellant Rollins Environmental Services (FS), Inc. ("Rollins") is in the business of handling, transporting, and cleaning up hazardous wastes. This case arises from Rollins' proposed treatment of certain particularly toxic and deadly substances known as polychlorinated biphenyls ("PCBs") that are found, among other places, in the insulating fluid of large electrical transformers and capacitors. PCBs are carcinogenic agents, and direct exposure even to minute quantities of them can be fatal. For this reason Congress established in the Toxic Substance Control Act ("TOSCA") a broad range of programs to dispose of PCBs safely and to phase out their use. P.L. 94-469, 15 U.S.C. § 2601 *et seq.* (1976).

In November, 1984, Rollins commenced PCB disposal operations at a facility located in Union, Louisiana, in the Parish of St. James. The site of the facility is about one-quarter mile from the Romeville Elementary School. Rollins planned to receive obsolete electrical transformers (some weighing several thousand pounds) at the facility by truck or rail, to drain off the fluid containing PCBs, and to rinse out the interiors of the transformers with diesel fuel. The insulating fluid and spent diesel fuel would then be placed in containers and shipped to another Rollins facility in Texas for final disposal; the

transformers themselves were to be shipped to a landfill in Nevada for burial. 2 Record on Appeal, Transcript of Proceedings ("Tr.") at 88. This procedure was designed by Rollins as part of a national program for the safe disposal of PCBs. Rollins has decontaminated thousands of transformers in this way, as specified by EPA regulations, see 40 C.F.R. 761.40-761.79 (1984), and its Texas incinerator is one of only three in the nation approved for the destruction of large quantities of PCBs. Tr. at 91, 95-98, 100-06.[1]

The first shipment of transformers arrived in Rollins' Union, Louisiana, facility on November 27, 1984. On December 19, 1984, the St. James Parish Council enacted Emergency Ordinance 84-29, "An Ordinance Regulating Hazardous Wastes and PCBs in St. James Parish," which provided in part:

> The treatment, storage, and disposal of polychlorinated biphenyls (PCB and PCB's) at commercial waste disposal facilities within the Parish of St. James is hereby prohibited.
>
> The transporting of polychlorinated biphenyls (PCB and PCB's) through the Parish of St. James shall require that the transporting agent supply a manifest to, and obtain a permit from, the Sheriffs [sic] Department of St. James Parish.

Two days later Rollins brought an action in the United States District Court for the Eastern District of Louisi-

---

1. See also Defendant's Exhibit 3 (letter from EPA administrator to Rollins stating in part that "A PCB disposal permit is not required for an activity which is specifically authorized by the PCB disposal regulation. Therefore, you may drain and flush PCB transformers in accordance with the procedures described in 40 CFR 761.60(b) (1) without an EPA permit.").

ana, challenging the Ordinance as violative of the Commerce Clause and Supremacy Clause of the U.S. Constitution and demanding declaratory and injunctive relief.

Ordinance 84-29 remained on the books for less than a month. At its next meeting, on January 29, 1985, the St. James Parish Council repealed Ordinance 84-29 and replaced it with Emergency Ordinance 85-1. Tr. at 19, 71. The new Ordinance is styled "An Ordinance Regulating Commercial Solvent Cleaning Businesses in St. James Parish," and it includes the following "prohibitions":

> A. No commercial solvent cleaning business may be conducted within one mile of any area of special concern.
>
> B. No commercial solvent cleaning business may be located in an area of special environmental concern or conducted so as to drain or discharge any spent solvent into any area of special environmental concern.
>
> C. No commercial solvent cleaning business may conduct any part of the cleaning operation except in a "contained area" as described in this ordinance.[2]

Rollins amended its complaint to challenge Ordinance 85-1, and it is this Ordinance that is at issue in the present case.

---

2. The Ordinance defines an area of special concern as "a school, day care center, nursing home, grain elevator, public building or auditorium, hospital, church, or theater"; an area of special environmental concern as "a flood hazard area or flood plain, wetland, surface or subsurface drinking water source in St. James Parish"; and a contained area as "a concrete slab at least two feet thick and sloped to collect any spilled solvent." The Ordinance also imposes a number of special building requirements on commercial solvent cleaning businesses and empowers the Parish Council to determine whether "a need for the proposed facility exists and the proposal is the best alternative to fill that need." "[O]n site cleaning or decontamination by any owner or his contractor" and "machinery or motor vehicle repair businesses" are specifically exempted from the scope of the Ordinance.

A full hearing was held in the district court on Rollins' request for a temporary restraining order. Rollins put on four witnesses: the President of St. James Parish, a civil engineer and land surveyor, a member of the St. James Parish Council, and the Vice-President of Rollins. After hearing their testimony and the arguments of counsel, including that of an Environmental Protection Agency ("EPA") representative, the district court found as a fact that Ordinance 85-1 amounted to, and had the practical effect of, an absolute prohibition of Rollins' activities in the Parish. See Tr. at 137-38, 139, 145, 149-50, 154-55. Nevertheless, the district court determined that it lacked subject matter jurisdiction and dismissed Rollins' suit. The key factor in the court's decision seems to have been the EPA's ambivalent position on the issue of preemption. See id. at 83-85, 117-18, 150, 151, 152-53 (describing EPA not ambiguously confirm that Ordinance 85-1 was preempted under TOSCA, the court was reluctant to disturb what it saw as an otherwise legitimate exercise of the Parish's political rulemaking and the local police powers.

II. JURISDICTION

The issue of jurisdiction is a threshold matter. Although some consideration of the merits may occasionally be necessary for a decision on jurisdiction, in this case the district court need not have looked very far to find jurisdiction.

The most obvious source of federal jurisdiction in this case is 28 U.S.C. § 1331, which confers original jurisdiction on the district courts to adjudicate "all civil actions arising under the Constitution, laws, or treaties of the United States." In its amended Complaint Rollins

invokes, inter alia, the Supremacy Clause of the U.S. Constitution, the Commerce Clause of the U.S. Constitution, and specific provisions of the Toxic Substances Control Act as bases for its claims. For a finding of federal question jurisdiction is not incumbent on the party asserting jurisdiction to prove in advance that it will ultimately prevail on the merits of its federal claims. *Bell v. Hood*, 327 U.S. 678, 682 (1946). Rather, the party asserting jurisdiction need only advance plausible, colorable claims that "arise under" federal law. As the Supreme Court stated in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), for purposes of jurisdiction it is sufficient that a party present claims that are not "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy . . . whatever may be the ultimate resolution of the federal issues on the merits." Id. at 666-67; see also *SED, Inc. v. City of Dayton*, 515 F.Supp. 737, 740-41 (S.D. Ohio 1981) (EPA's position on preemption of ordinance regulating PCB's irrelevant to issue of jurisdiction).

In this case it is clear that federal law supplies essential elements of Rollins' claims. First, Rollins asserts that Ordinance 85-1 regulates an area of concern that is expressly preempted under TOSCA, § 18(a)(2)(B), and thus directly violates the Supremacy Clause of the U.S. Constitution. Second, Rollins maintains that Ordinance 85-1 conflicts with implied Congressional goals and purposes, expressed through enactments in the same field—namely, the comprehensive legislative and regulatory scheme enacted in TOSCA—and is thus unconstitutional under the implied preemption doctrine of the Supremacy Clause. Finally, Rollins alleges that the Ordinance constitutes a substantial burden on interstate commerce and

thereby violates the Commerce Clause of the U.S. Constitution. Clearly, these claims are plausible enough and present sufficiently substantial federal questions to get Rollins into federal court.[3]

Our finding of jurisdiction is buttressed by the fact that appellee St. James Parish did not seriously contest the issue in its brief and virtually conceded jurisdiction at oral argument.

III. SCOPE OF REVIEW

Ordinarily we would have no occasion to reach the merits of a case dismissed in federal court for want of jurisdiction. In the present case, however, it is clear that the district court based its jurisdictional ruling on the merits of Rollins' federal claim. A brief examination of the record confirms this interpretation of the proceedings below.

At the outset of the hearing on Rollins' request for a temporary restraining order the district court directed counsel for both parties to focus their efforts on the "threshold" issue of jurisdiction. Tr. at 4-5. The court then proceeded to hear four witnesses, noting that "the whole question of preemption seems to require a certain amount of, I guess you would have to say, testimony on the merits . . . . " Id. at 52. The witnesses testified in detail on such diverse subjects as the porosity of concrete, the location of a 1,000-year flood plain in St. James Parish, and the volume of water that would pass through an eight-inch water line at sixty pounds per square inch

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3. Since we find federal question jurisdiction under 28 U.S.C. § 1331 it is unnecessary for us to consider whether, as appears to be the case, federal jurisdiction would also lie in the district court under 28 U.S.C. § 1332 (diversity jurisdiction) and 28 U.S.C. § 1337 (jurisdiction under commerce regulation).

pressure during six hours of continuous use. At the end of this testimony, and after hearing the arguments of counsel, the district court concluded that, but for its preceived lack of jurisdiction, the district court stated,

> then I would have to say to the very able and I think distinguished parish Council, you all are in trouble. Because I think as a factual matter, the result of your Ordinance, however well intended, however much was your feeling that that was the will of the people you are elected by, the fact of the matter is that it does effectively kick Rollins out of the Parish, insofar as this activity is concerned.

Id. at 154.

As will be more fully developed below, the purpose and effect of Ordinance 85-1 are the only real factual issues in this case. On these issues, the district court made explicit findings of fact. See id. at 137-38, 139, 145-50, 154.[4]

---

4. In reaching the merits of this case we note that counsel for both parties briefed these issues fully. In their briefs, and at oral argument, both parties appear to have acknowledged the propriety of appellate review on the merits. See Appellee's Brief at 2 ("In order to determine that ordinance 85-1 was bona fide the Court had to hear the evidence about what the ordinance did and what Rollins proposed to do. All evidentiary issues were fully explored in the Court below."); id. at 3 ("Statement of the Issues Presented for Review"); id. at 19 ("The . . . jurisdictional issue is closely intertwined with the merits. For this reason, as Rollins concedes in brief, the case was fully tried in the court below. All evidence to support the Rollins claims is now before this Court."); Appellant's Brief at 21 ("Remand of the case for findings as to the applicability of the ordinance and its validity is unnecessary, and would be wasteful of judicial resources since no issues of material fact remain and the legal issues can be fully briefed and argued in this appeal."); Appellant's Reply Brief at 3 ("The question of whether Ordinance 85-1 is constitutional, as well as the question of whether subject matter jurisdiction resides in the district court, should both be decided in this appeal."); see also *Independent Bankers Association v. Heimann*, 613 F.2d 1164, 1167 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980).

IV. PREEMPTION

The overall purpose of the Toxic Substances Control Act was to set in place a comprehensive, national scheme to protect humans and the environment from the dangers of toxic substances. Congress recognized that state and local ordinances might thwart the effectiveness of a national legislative and regulatory scheme; accordingly, section 2 of TOSCA states that "the effective regulation of interstate commerce in such chemical substances and mixtures also necessitates the regulation of intrastate commerce in such chemical substances and mixtures." 15 U.S.C. § 2601(a)(3).[5]

Sections 2604 and 2605 of Title 15 are the basic provisions of TOSCA mandating a comprehensive regulatory scheme for toxic substances. Section 2605(e)(1) provides in part:

> (e) Polychlorinated biphenyls.—(1) Within six months after January 2, 1977, the Administrator shall promulgate rules to—
>
> (A) prescribe methods for the disposal of polychlorinated biphenyls, and

---

5. The House report on TOSCA explains that:

> The Committee has extended the reach of the regulatory authority of the bill to all chemical substances and mixtures whether an interstate commerce or not since the size and scope of the chemical industry makes it impossible to distinguish betwen those in interstate commerce and those which are not. Further, commerce in those which are arguably only in intrastate commerce may affect commerce in those which are in interstate commerce, and consequently there cannot be effective regulation of the latter without regulation of the former. Also regulation of only those in interstate commerce without regulation of the others could depress commerce and discriminate against those in interstate commerce and adversely burden, obstruct, and affect such commerce.

H.R. Rep. No. 94-1341, 94th Cong., 2d Sess. (1976), reprinted in House Committee on Interstate and Foreign Commerce Legislative History of the Toxic Substances Control Act at 417.

> (B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions, with respect to their processing, distribution in commerce, use or disposal or with respect to any combination of such activities.

To effectuate Congress' national regulatory objectives Section 18(a)(2)(B) of TOSCA, codified at 15 U.S.C. § 2617, contains an explicit preemption provision, which reads as follows:

Preemption

. . . .

Except as provided in subsection (b) of this section—

. . . .

> . . . if the Administrator prescribes a rule or order under Section 2604 or 2605 of this title (other than a rule imposing a requirement described in subsection (a)(6) of section 2605 of this title) which is applicable to a chemical substance or mixture, and which is designed to protect against a risk of injury to health or the environment associated with such substance or mixture, no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture, or an article containing such substance or mixture, and which is designed to protect against such risk unless such requirement (i) is identical to the requirement prescribed by the Administrator, (ii) is adopted under the authority of the Clean Air Act or any Federal law, or (iii) prohibits the use of such substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).

15 U.S.C. § 2617(a)(2)(B).[6]

In 1978 the EPA promulgated a comprehensive set of PCB disposal regulations pursuant to its authority under Section 2605. See 43 Fed. Reg. 7150 (Feb 17, 1978). These regulations have been codified at 40 C.F.R. §§ 761.40-761.79 (1984). The Parish of St. James does not maintain that Ordinance 85-1 qualifies for any of the three above-numbered exceptions to the preemption provision. Subsection (b) details a procedure for obtaining exemptions from the preemption provision, but the Parish has not applied for such an exemption. Thus all the conditions necessary to trigger the preemption provisions of TOSCA have been met.[7]

Article VI of the U.S. Constitution provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the

---

6. Congressman McCollister, the floor manager of the bill, explained the preemption provision as follows:

> State law is preempted only when the EPA has issued a rule under Section 4, Section 5 or Section 6 [of TOSCA]. If the EPA has not acted, the States are free to act. If the EPA has acted, then the States must apply for an exemption from the preemption.
>
> Before the State can put a different requirement into effect, it has to ask for an exemption from the preemption.
>
> This provision was designed to discourage State requirements which would put an undue burden on those companies that do business in a number of States.

House Debate, August 23, 1976, reprinted in House Committee on Interstate and Foreign Commerce Legislative History of the Toxic Substances Control Act at 625.

7. As noted above, the EPA regulations governing PCBs were promulgated under the authority of subsection (e)(1) of Section 2605 of Title 15 (TOSCA section 6(e)(1)), not subsection 2605. See 43 Fed. Reg. 7150 (Feb. 17, 1978). Thus the parenthetical exception to the preemption provision—"(other than a rule imposing a requirement described in subsection (a)(6) of Section 2605 of this title)"—does not apply. See *SED, Inc. v. City of Dayton*, 519 F.Supp. 979, 987-88 (S.D. Ohio 1981).

supreme Law of the Land." It is well established that Congress may, within constitutional limits, absolutely preempt state and local rulemaking authority in a given area. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Pacific Gas and Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190, 203-04 (1983). Even where Congress has not entirely displaced state and local rulemaking in a specific area, those lower laws are preempted to the extent that they conflict with federal law. Where a lower law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), it is preempted. Preemption may also be "inferred" from the existence of a comprehensive Congressional scheme covering an area of activity. *Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Here, however, Congress has explicitly mandated that TOSCA, and regulations promulgated under it by the EPA, preempt state and local regulation of PCB disposal.[8]

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8. See *Warren County v. North Carolina*, 528 F.Supp. 276 (E.D. N.C. 1981):

> If [the Supremacy Clause] of the Constitution means anything it must mean that a county may not pass an ordinace, the effect of which is to totally frustrate an entire statutory plan enacted by the Congress for the protection of citizens in all fifty states. Were the Court to approve this ordinance, no doubt the other ninety-nine counties in North Carolina would quickly enact identical bans. What, then, would North Carolina do with the PCB laced soil? Surely our neighbors in Virginia and Tennessee, South Carolina and Georgia would also object to our carrying such wastes into their states. The Warren County ordinance clearly stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Toxic Substances Control Act and, therefore, is void.

(Footnote continued.)

Against this legal background, appellee St. James Parish wisely declines to dispute the validity of Congressional preemption as a general proposition. The Parish acknowledges that an outright ban or prohibition or PCB disposal activity would be impermissible under TOSCA. *See, e.g., Warren County,* 528 F.Supp. at 290. However, in response to the foregoing analysis the Parish insists that its challenged Ordinance is not a PCB ordinance at all. There is no mention of "PCBs," "transformers," or "toxic substances" in Ordinance 85-1; instead, it refers exclusively to "commercial solvent cleaning" operations and the like. In other words, the Parish argues that its Ordinance does not regulate the same field of activity preempted by Congress.[9] In terms of TOSCA, the Parish has to be saying that its Ordinance is not "applicable to" the same "chemical substance or mixture" that Congress had in mind, and that it is not "designed to protect against a risk of injury to health or the environment associated with such substance or mixture." 15 U.S.C. § 2617. Only if the Ordinance were a "sham"—which counsel for the Parish defined at oral argument as a "total subterfuge"—would it be invalid. We accept appellee's definition and hold today that Ordinance 85-1 is indeed a sham.

At the very least, an exercise of legislative rulemaking authority must be a reasonable means of

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(Footnote 8 continued.)

Id. at 290. See also *Twitty v. North Carolina*, 527 F.Supp. 778 (E.D. N.C. 1981) (companion case to *Warren County*), aff'd., 696 F.2d 992 (4th Cir. 1982); *Chemical Waste Management, Inc. v. Broadwater*, Civil Action No. 84-G-1208-W (N.D. Ala. 1984), *appeal dismissed*, 758 F.2d 1538 (11th Cir. 1985); *SED, Inc. v. City of Dayton*, 519 F.Supp. 979 (S.D. Ohio 1981). *But see Chappell v. SCA Services, Inc.*, 540 F.Supp. 1087 (C.D. Ill. 1982).

9. See, e.g., Appellee's Answer [P] 7 ("At the present time, the St. James Parish Council does not have in effect any regulations on PCB compounds.").

attaining legitimate governmental objectives. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Jiminez v. Weinberger*, 417 U.S. 628 (1974). Here, of course, the question is not so much whether the challenged Ordinance is rationally related to legitimate objectives, but whether it trenches impermissibly upon a field preempted by Congress. Nevertheless, the two analyses are related. Insofar as Ordinance 85-1 amounts to an outright ban of prohibition of appellant's PCB disposal activities, it has the legitimate objective of regulating a field preempted by Congress. Alternatively, even viewed as a "commercial solvent cleaning" regulation, the Ordinance would be an unreasonably burdensome and restrictive means of attaining that end, and would thus be in violation of the Commerce Clause.[10]

In construing Ordinance 85-1 we look to its purpose and effect. Guidance in interpreting the Ordinance is

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10. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Kassal v. Consolidated Freightways Corp.*, 450 U.S. 662, 670-71 (1981); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622, 626-29 (1978) (garbage); *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980) (industrial wastes); *Washington State Building and Construction Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied sub nom. *Don't Waste Washington Legal Defense Foundation v. Washington*, 461 U.S. 913 (1983) (low-level radioactive waste); *Illinois v. General Electric Co.*, 683 F.2d 206 (7th Cir. 1982), cert. denied sub nom. *Hartigan v. General Electric Co.*, 461 U.S. 913 (1983) (nuclear wastes); see also Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208, 219-20 (1959):

> The Court . . . appears to use essentially the same reasoning process in a case nominally hinging on pre-emption as it has in past cases in which the question was whether the state law regulated or burdened interstate commerce. [T]he Court has adopted the same weighing of interests approach in pre-emption cases that it uses to determine whether a state law unjustificably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the pre-emption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market.

provided by (1) the chronology of events leading up to its passage-its "legislative history," so to speak; (2) the testimony below on several notable features of the Ordinance; and (3) the explicit findings of fact made by the trial judge.

Although an examination of the motives and intentions of those who enacted a measure is no substitute for a reading of its plain language, such an inquiry can provide useful context for understanding the real meaning and import of legislation.[11] In this case, as has been noted above, the challenged measure was immediately preceded by Ordinance 84-29, enacted on December 29, 1984, which provided for an express ban or prohibition of PCB disposal activities: "The treatment, storage and disposal of polychlorinated biphenyls (PCB and PCB's) at commercial waste disposal facilities within the Parish of St. James is hereby prohibited." Appellee concedes in its brief that "The original ordinance contained a ban on PCB disposal practices. . . . This ordinance had problems under the commerce clause and [under] several district court decisions interpreting the Toxic Substances Control Act. . . ." Appellee's Brief at 4. The Agenda for the next meeting of the Parish Council included two references to "Amending Ordinance 84-29," and at that meeting the challenged Ordinance 85-1 was enacted to replace Ordinance 84-29. See Testimony of Paul Keller, President of St. James Parish, Tr. at 19 (Ordinance 85-1 "was intended to replace" 84-29); Testimony of Robert Benn, Jr., St. James Parish Councilman, Tr. at 71 (same). In light of the foregoing, it hardly takes a leap of faith to conclude that Ordinance 85-1 has the same purpose as

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11. See *Pacific Gas and Electric*, 461 U.S. at 216; *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

the rescinded Ordinance 84-29, namely to ban or prohibit PCB disposal activity in the Parish.[12]

The district court below heard uncontroverted testimony to the effect that Ordinance 85-1 amounted either to an outright prohibition of Rollins' PCB disposal activities or an unreasonably burdensome and restrictive regulation of its "commercial solvent cleaning" business. Several key features of the Ordinance call attention to themselves. First, it provides that no commercial solvent cleaning business may be conducted within one mile of any "area of special concern," which the Ordinance defines as "a school, day care center, nursing home, grain elevator, public building or auditorium, hospital, church, or theater." The Parish President testified that this pro vision alone would exclude 83% of the Parish from consideration as a "commercial solvent cleaning business" site. Tr. at 26. Second, the Ordinance provides that no commercial solvent cleaning business may be located in "an area of special environmental concern," which the Ordinance defines as "a flood hazard area of flood plain, wetland, surface or subsurface drinking water source in St. James Parish." The Parish President testified that, under various possible interpretations of these terms, the entire Parish would be excluded from consideration as a "commercial solvent cleaning business" site. See Tr. at 32-37.

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12. Further evidence that the purpose of the Ordinance was to ban or prohibit PCB disposal activities in general, and Rollins' business in particular, is to be found in the provisions of the Ordinance that inexplicitly exempt local businesses from its prohibitions:

> The term ["Commercial Solvent Cleaning Business"] shall not include on site cleaning or decontamination by any owner or his contractor nor does it include machinery or motor vehicle repair businesses when cleaning and decontamination is incidental to a bona-fide effort to repair the machinery or vehicle.

Finally, Ordinance 85-1 imposes a number of special building requirements for commercial solvent cleaning business, including the requirements that such businesses be built on a concrete slab "at least two feet thick" and that they have on site "at least one 8" water line capable of maintaining normal pressure through at least six hours of continuous use." The Parish President testified that he had "no [idea] whatsoever" why a two-foot thick slab of concrete would [be] necessary for commercial solvent cleaning operations, and added that he knew of no other Ordinance imposing this requirement in the Parish. Tr. at 42. Rollins then put on an expert engineer who testified that the requirement of a two-foot thick concrete slab was "unreasonable" from an engineering point of view and that Rollins' six-inch thick slab was "totally adequate" for its intended purpose. Testimony of Ronald K. Ferris, Tr. at 55. This engineer also testified that the water supply required by the Ordinance would cover the Rollins facility to a height of fifty-eight feet. Id. at 57.

In the face of this testimony, we have no difficulty upholding the district court's finding of fact that Ordinance 85-1 was so unreasonably burdensome and restrictive that it amounted to an impermissible ban or prohibition of Rollins' PCB disposal business. The court below was explicit as to its findings:

> [A]s a practical matter, in order that some reviewing Court may know how it all strikes me, I do believe that it is very well intended, but nevertheless calculated effort to say no without actually really ever saying no.
>
> In other words, I don't want any of the parties or the attorneys or the record or any reviewing Court to have to labor with one determination that I think I

> should make [as] a fact-finder and that determination is that whatever good faith I may ascribe to the witnesses who testified, and I do ascribe total good faith to them, I am still pretty much convinced that the end result sought by this Ordinance is to do exactly what you say it isn't to do, and that is to stop this company's clock, as far as operating in St. James Parish is concerned.

Tr. at 137-38; see also id. at 139, 154-55. Elsewhere in its findings of fact the district court expressly rejected the Parish's contention that its Ordinance is not a PCB regulation at all, but rather an ordinance of general applicability regulating "commercial solvent cleaning" businesses:

> I perceive the Ordinance to be more far reaching than its title indicates, and . . . I am convinced as a practical person and as a fact finder that the essential implications of the Ordinance are not necessarily to control a particular cleaning substance, but to stop the operations of Rollins in this parish, at least at this point in time and at this physical location.

Id. at 149-50; see also id. at 145. The district court's findings are amply supported by the record in this case. We conclude therefore that Ordinance 85-1 is an impermissible intrusion into territory preempted under TOSCA and that enforcement of it would violate the Supremacy Clause of the federal Constitution.

V. CONCLUSION

This court is not insensitive to the concerns expressed by the Parish of St. James in this case. No one wants a toxic waste disposal facility "in his own back yard"—and for good reason. The uncontrolled chemical emissions that have occurred elsewhere this year lend

sober perspective to the sanguine assurances of scientists that such mishaps will not—indeed, cannot—occur. These concerns are rightfully intensified when, as here, a hazardous facility appears to have been located almost deliberately on the most inauspicious possible site, one-quarter mile from a local elementary school.

Precisely because of such concerns, Congress enacted in the Toxic Substances Control Act a broad national program of measures of prevent and guard against the uncontrolled and hazardous emission of substances such as PCBs. If every locality were able to dodge responsibility for and participation in this program through artfully designed ordinances, the national goal of safe, environmentally sound toxic waste disposal would surely be frustrated. And, for all we know, electrical transformers of the Romeville Elementary School may present at this very moment far greater dangers of uncontrolled and disastrous PCB emission than the Rollins facility.

Moreover, our holding today does not mean that the Parish must simply resign itself to the present location of Rollins' ill-fated facility. As noted above, Congress also provided in TOSCA an orderly procedure by which exemptions from its preemption provisions can be sought and obtained. But the enactment of an ordinance that can only be characterized as a subterfuge is not an appropriate response to legitimate concerns over the dangers of PCBs.

The Continental Congress knew that, without a powerful preemption doctrine, its chances of forming a more perfect union of the struggling states, with their variegated philosophies and economics, would have been nil. For this reason a strong Supremacy Clause was inserted in the Constitution, and it has been justified by the

events of the founding years and throughout the history of our country.

In the 1960's, for example, the Civil Rights legislation and the Voting Rights Act were distinctly distasteful to some of the states of the Union. These states responded with an agenda of frustrating and nullifying and eviscerating the benign principles of *Brown v. Board of Education* and the subsequent Civil Rights legislation. Thus, the state legislatures busily engaged in the legislative process, passing bills and convening the legislature in the midnight hours—at times to negate what Congress and the President had put into law the day before. It quickly became obvious that the federal supremacy fostered by the Constitution, and the doctrine of preemption as it applies when federal statutes are involved, were indispensable in assuring that there could be no interdiction of the progress of civil rights through state legislative action.

Preemption is an absolute necessity, an imperative, if the federal government is to be a federal government. To do what is asked for by the appellee in this case is really to change the whole constitutional structure of our country and to bury federalism many feet below the surface of a babbling group of states and an utterly ineffective federal government. The Constitution of the United States prevents the erection of 50 Towers of Babel.

Accordingly, we REVERSE and grant Rollins Environmental Services' petition to enjoin enforcement of Ordinance 85-1.

REVERSED.

Supreme Court, U.S.
FILED
DEC 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-616

In the Supreme Court of the United States

OCTOBER TERM, 1985

SHARON STEEL CORPORATION, APPELLANT

v.

THE CITY OF FAIRMONT, WEST VIRGINIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, preempts a municipal ordinance that declares the unsafe permanent disposal of hazardous wastes within the city to be a nuisance.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Appellant operated a coking plant in the City of Fairmont, West Virginia from 1948 through 1979. After closing the plant, appellant sought to construct a permanent facility at the plant site for disposing of the hazardous by-products that had accumulated there. J.S. App. 3a. In June 1983, the City passed Ordinance No. 597, which prohibits the permanent storage of wastes that "pose a substantial present or potential hazard to human health or the environment when stored." J.S. App. 38a-39a. The ordinance deems "such disposal of hazardous waste * * * a public nuisance," it authorizes the City Attorney to institute civil actions to abate such nuisances, and it provides for criminal misdemeanor penalties. *Id.* at 39a.

2. a. Appellant instituted this action against appellees, the City and City officials, in the Circuit Court of Marion County, West Virginia, seeking a declaratory judgment that the ordinance is preempted under federal and state law. On cross-motions for summary judgment, the circuit court entered judgment in appellees' favor. J.S. App. 26a-28a, 29a-31a. The circuit court stated that the ordinance "is not designed to regulate the disposal of hazardous waste" but only "to deal with a nuisance." *Id.* at 27a. Moreover, the court concluded, the effect of the ordinance would "not be far-reaching" and would not "frustrate West Virginia's comprehensive statewide regulatory scheme." *Ibid.*

b. The Supreme Court of Appeals of West Virginia affirmed. J.S. App. 1a-23a. The Supreme Court of Appeals concluded that the "effect of the ordinance is to define a public nuisance condition involving hazardous wastes." *Id.* at 7a; see also *id.* at 21a (ordinance defines a "common law nuisance"). The court made clear that "the ordinance does not completely ban hazardous waste disposal facilities, but is directed at those that pose a substantial danger to human health or the environment." *Id.* at 16a-17a. Thus, the ordinance prohibits only "the permanent storage of hazardous wastes which are *improperly* stored." *Id.* at 6a (emphasis added). The burden is on the City, the court stated, to show that any particular waste disposal site is so unreasonable as to constitute a nuisance. *Id.* at 19a, 20a. The court concluded that "the issue of whether a given site is a public nuisance is a question of fact dependent upon the circumstances existing at such site." *Id.* at 21a.

The Supreme Court of Appeals held that the ordinance, as thus interpreted, is not preempted by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq.*, or state law. J.S. App. 11a-17a. In concluding that the ordinance does not conflict with the RCRA, the court noted that the Act contains a savings clause, 42 U.S.C. 6972(f),

which permits persons to bring actions to abate nuisances as defined under state law. J.S. App. 12a-13a. The court distinguished cases involving absolute bans on waste disposal facilities because the ordinance at issue here does not completely ban disposal sites within the City. *Id.* at 16a-17a.

DISCUSSION

Appellant argues (J.S. 7-19) that the City's ordinance constitutes an absolute prohibition of permanent hazardous waste disposal sites within the City. See, *e.g.*, J.S. 7 (ordinance "absolutely prohibit[s]" waste disposal sites); *id.* at 12 (ordinance is a "blanket local siting ban"). While a complete prohibition on placement of hazardous waste sites might in some circumstances conflict with the federal scheme set forth in the Resource Conservation and Recovery Act, that question is not presented here. The Supreme Court of Appeals has authoritatively interpreted the ordinance to prohibit only the *unsafe* disposal of hazardous wastes. J.S. App. 6a-7a, 16a-17a, 19a-21a. See, *e.g., Brown* v. *Ohio*, 432 U.S. 161, 167 (1977). Nothing in the facts of this case suggests that such a ban threatens significantly to interfere with achievement of the purposes of the RCRA. Appellants' contentions are insubstantial.

The RCRA does not expressly preempt the states from regulating hazardous waste disposal facilities. To the contrary, Congress provided that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies," 42 U.S.C. 6901(a)(4), and it expressly permitted state and local regulation of the siting of hazardous waste disposal facilities:

> Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by [federal] regulations.

42 U.S.C. 6929.[1] As this Court stated in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 620-621 n.4 (1978) (citation omitted), the RCRA does not evince a " 'clear and manifest purpose of Congress' * * * to pre-empt the entire field of interstate waste management or transportation, either by express statutory command, * * * or by implicit legislative design."[2]

This Court consistently has applied a "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), slip op. 7; see, *e.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In view of this presumption and Congress's clear intent to preserve for the states a significant role in the regulation of hazardous wastes, the ordinance could be invalidated under the Supremacy Clause only if it plainly " 'stands as an obstacle to the accomplishment and execution of the full

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[1]See also 42 U.S.C. 6972(f) (permitting persons to "seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste" under "any statute or common law"). Appellant erroneously argues (J.S. 17) that this provision is irrelevant because the City's ordinance does not provide for the enforcement of any hazardous waste standard. To the contrary, the ordinance establishes just such a standard by codifying the common law of nuisance and applying it to hazardous waste disposal facilities, and it expressly provides for enforcement actions to abate such nuisances. Cf. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 327-328 (1981) (suggesting role for state nuisance actions under the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*).

[2]In *City of Philadelphia*, the Court stated (437 U.S. at 620-621 n.4) that an absolute prohibition on the transportation of wastes into a state was not preempted by the RCRA (although the Court concluded that the prohibition violated the Commerce Clause (*id.* at 629)). It follows a fortiori that the partial ban only on unsafe disposal sites at issue here is not preempted.

purposes and objectives of Congress' "in the RCRA. *Hillsborough County*, slip op. 5, quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Such a conflict, if it existed, would have to be "strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Hillsborough County*, slip op. 8.

We do not perceive any conflict here. The ordinance does not absolutely prohibit the permanent storage of hazardous wastes within the City. Rather, it reaches only disposal sites that constitute a public nuisance by virtue of improper storage of the wastes.[3] This will not necessarily interfere with the federal regulatory scheme. See *Neal* v. *Darby*, 282 S.C. 277, 284-285, 318 S.E.2d 18, 23 (App. 1984) (public nuisance action to enjoin hazardous waste disposal site not preempted by RCRA); *State* v. *Monarch Chemicals, Inc.*, 90 A.D.2d 907, 456 N.Y.S.2d 867 (1982) (same).[4] The

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[3]Appellant's suggestion (J.S. 11) that the ordinance absolutely prohibits the disposal of precisely those wastes that the RCRA permits to be disposed is in error. As interpreted by the Supreme Court of Appeals, the ordinance is not a blanket prohibition but only a requirement that disposal be conducted in a safe and proper manner. The ordinance's reference (§ 1, J.S. App. 38a) to those wastes "whose disposal would require a state or federal hazardous waste permit" further limits the coverage of the ordinance. It does not convert the partial prohibition into an absolute ban.

[4]The cases on which appellant relies (J.S. 13; Reply Br. 2-3) are inapposite. All three cases involved absolute prohibitions of disposal sites rather than the banning only of unsafe sites at issue here. Moreover, *Rollins Environmental Services (FS), Inc.* v. *Parish of St. James*, 775 F.2d 627, 633-637 (5th Cir. 1985), and *Warren County* v. *State of North Carolina*, 528 F. Supp. 276, 288-290 (E.D.N.C. 1981), addressed preemption under the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*, which, in contrast to the RCRA, expressly preempts state regulation. 15 U.S.C. 2617(a)(2)(B). Finally, the court in *Rollins Environmental Services of Louisiana, Inc.* v. *Iberville Parish Police Jury*, 371 So. 2d 1127 (La. 1979), struck down a local prohibition on hazardous waste disposal largely because it was not authorized under state law.

ordinance requires a case-by-case determination of the reasonableness of any particular hazardous waste disposal site. J.S. App. 21a. Such a determination has yet to be made in the context of this declaratory judgment action. Whatever the merits of a preemption claim with respect to application of the ordinance in a particular case, we believe that the ordinance, as interpreted by the Supreme Court of Appeals, plainly is valid on its face.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question.

Respectfully submitted.

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